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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1992

BLUE JEANS EQUITIES WEST
A Joint Venture
Petitioner,

vs.

CITY & COUNTY OF SAN FRANCISCO
A Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTIONS PRESENTED

1 Whether this Court's opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), holding that the "just compensation" clause of the Fifth Amendment requires that an exaction imposed as a condition of project approval must substantially advance legitimate public interests directly related to the project approved, applies to all exactions—or is the holding in *Nollan* limited solely to exactions of interests in land, as the California Court of Appeal held.

2. Whether this Court's decision in *Nollan, supra*, applies only to "possessory takings" cases and does not apply to "regulatory takings" cases, as the California Court of Appeal held.

3. Whether the action of the City and County of San Francisco ("City") constitutes a "taking" under the Fifth and Fourteenth Amendments of the United States Constitution when City has sought to impose a regulatory fee of $3,100,000 on a project approved two years prior to the enactment of the regulatory fee and where the fee seeks to alleviate impacts that were not found to have been caused or created by the project in question at the time it was approved.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeal of the State of California.

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CITY & COUNTY OF SAN FRANCISCO
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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

Petitioner, BLUE JEANS EQUITIES WEST, a joint venture ("BJEW"), petitions for a Writ of Certiorari to review the order of the California Court of Appeal, First Appellate District, Division Three. The California Supreme Court denied BJEW's request for review and there are no other avenues for review of the decision and judgment within the California court system.

NOTE: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated. We support factual statements by citation to the record before the California Court of Appeal. We use "RT" to signify citations to the Reporter's Transcript and "AA" to signify citations to Appellant's Appendix (containing documents filed with the Court Clerk) by document and page reference where appropriate. We refer to trial exhibits by exhibit number.

OPINION BELOW

The opinion of the Court of Appeals is reported at 3 Cal.App.4th 164, 4 Cal. Rptr. 2d 114 (January 31, 1992). A copy of the opinion is attached as Appendix A. The order of the California Supreme Court denying BJEW's Petition for Review was filed on April 29, 1992. A copy of the Supreme Court's Order is included as Appendix B.

JURISDICTION

The California Supreme Court's denial of BJEW's Petition for Review constitutes the final decision of California's highest court in this matter. This Court has jurisdiction under 28 USC Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> SECTION 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. *Procedural Posture: Ripeness.*

This case concerns the validity of a permit condition imposed by the City and County of San Francisco ("City") when it gave its final approval to a development project, a high-rise office and retail building. City finally interpreted the permit condition when it demanded payment of a regulatory fee that it claimed was owed under that permit condition. BJEW paid the fee under protest and commenced this action to contest it. It seeks this writ to reverse an adverse ruling after a bench trial on the merits, affirmed on appeal by the California Court of Appeal, and after review was denied by the California Supreme Court.[1]

B. *Summary.*

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court held that a condition imposed in connection with the approval of a project violates the "just compensation" requirement of the Fifth Amendment of the United States Constitution unless it alleviates an impact caused by the project approved. *In this case, the California courts have held that the Nollan doctrine does not apply to the facts recited below*—that City can require BJEW to pay a regulatory fee without showing that the imposition substantially advances a legitimate public interest that the project impacts. The California courts have concluded that *Nollan* does not apply because it is a "possessory takings" case, and the constitutional requirement that *Nollan* declares does not apply to the *regulatory* imposition of fees.

BJEW is the owner of an office and retail complex known as "Levi's Plaza" located at the foot of Telegraph Hill in the Northeast Waterfront section of San Francisco, California.[2] City granted final approval for Levi's Plaza on January 4, 1979.[3]

The approval resolution ("Resolution") contained many conditions. The condition at issue here is:

> 5(c) The owner of the project shall make a good faith effort to participate in future funding mechanisms to assure ade-

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[1] City has made "a final and authoritative determination" of the terms and conditions upon which it would allow development to proceed. BJEW's claims are ripe for adjudication under the doctrine of *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

[2] See Map, Appendix C attached.

[3] Ex. 2.

> quate transit service *to the area of the City in which the project is located.*[4]

This case arises out of City's effort to collect $3,100,000 as a fee to raise money for capital transit improvements pursuant to an ordinance enacted two years after it approved Levi's Plaza.[5] By that time, Levi's Plaza was nearly complete. Unless Paragraph 5(c) requires BJEW to pay, City cannot constitutionally collect the fee.[6]

City had no transit funding mechanism in place or in contemplation while it was considering and approving Levi's Plaza.

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[4] Ex. 2, Para. 5(c). Approval resolutions are the "law of the City." The rules of statutory construction apply. See *Terminal Plaza Corp. v. City and County of San Francisco*, 186 Cal.App.3d 814, 825, n. 7, 230 Cal. Rptr. 875, 880 n. 7 (1986).

[5] Ordinance No. 224-81, San Francisco Admin. Code 38.1, *et seq.*; Ex. 5.

[6] *Russ Building Partnership v. City & County of San Francisco*, 44 Cal.3d 839, 244 Cal. Rptr. 682, 750 P.2d 324 (1988) determined that the fee here in question was a development or regulatory fee, and not a tax. If the fee had been determined to be a "tax," it would have violated California Proposition 13 limits because it was enacted without the required two-thirds vote. Cal. Constitution Article 13A. As a development fee, it cannot apply to a project protected by a "vested right," *i.e.*, the right to proceed free of regulation adopted after the vested right accrued. *Russ Building Partnership*, 44 Cal.3d, at 845-46; *Avco Community Developers v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976), *appeal dism'd*, 429 U.S. 1083 (1977). State law controls the definition and extent of "vested rights" as an incident of the concept of "property." *See, e.g., Lakeview Development Corporation v. South Lake Tahoe*, 915 F.2d 1290 (9th Cir. 1990). As this Court has stated, "[W]e are mindful of the basic axiom that '"[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), quoting from *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting in turn from *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

Indeed, Levi's Plaza was the first commercial project approved by City where City's planners recognized a possible "linkage" between new development and impact upon transit service.[7]

When it approved Levi's Plaza, City did not have enough evidence of the project's expected impact on transit to impose a mandatory requirement.[8] Its ideas were "general and amorphous . . ."[9] The only funding mechanism tentatively discussed during consideration of Levi's Plaza was an assessment district, a device that would impose the cost of additional transit service upon all developed property rather than simply upon new development.[10]

More than two years later, City enacted the Transit Impact Development Fee Ordinance ("TIDFO") imposing a $5.00 per square foot fee on new construction in the "Downtown Area" of the City, broadly defined to include the Northeast Waterfront area where Levi's Plaza is located.[11] Claiming that the TIDFO constitutes the funding mechanism referred to in Paragraph 5(c) of the Resolution, City demanded that BJEW pay $3,100,000. BJEW paid the money into escrow under protest and commenced this action to contest it. The amount in issue now exceeds $4,000,000, with interest.

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[7] See note 15, *infra*.

[8] See note 16, *infra*.

[9] Testimony of Assistant Planning Director, RT 172:2-3. At trial, the City Attorney characterized the situation as follows:

> "As of January 4, 1979 [when Levi's Plaza was approved] . . . no [City] employee knew what kind of funding mechanism, *if any*, would be imposed on BJEW to mitigate the transit impact generated by the Levi's project." RT 49:18-23.

This statement purports to paraphrase Paragraph 18 contained in a stipulation of facts in the Clerk's Record at AA 29. It is an admission binding on City. See *Oscanyan v. Winchester Repeating Arms. Co.*, 103 U.S. 261 (1881).

[10] RT 75:8-23; 76:5-9; 101:17-102:12; 105:28-107:15; AA 28-29, ¶¶ 16-17.

[11] The "Downtown Area" as defined by the TIDFO includes an attenuated geographical appendage, apparently designed to include Levi's Plaza notwithstanding its remoteness from the traditional downtown area. See Appendix C.

When it was considering BJEW's application for approval of Levi's Plaza, City prepared an environmental impact report. That report, and other material available at the time, showed that Levi's Plaza *might* impose a burden on transit service. Designed to house the corporate offices of Levi Strauss & Co., the project would relocate Levi's employees away from the traditional downtown area to the Northeast Waterfront—an area that was then underserved by transit.[12]

The transit deficit in the Northeast Waterfront, however, was not then related to office use; nor was it seen as part of a larger problem besetting the urban core. In its very next action recognizing possible linkage between project construction and transit impact, City imposed a condition on approval of a *residential project* in language identical to that used with respect to Levi's Plaza.[13] Despite the identical language in its permit and its location close to Levi's Plaza, the "Downtown Area" as defined by the TIDFO excludes this project.

None of the planning documents or data considered by City while it was processing or approving the permit for Levi's Plaza quantified its expected impact on transit or defined an area of impact broader than the Northeast Waterfront. Members of the City Staff thought there was an impact—but they didn't know what it was and didn't know that they would ever know with sufficient certainty to impose a mandatory requirement.[14]

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[12] Ex. 1 (Levi's Plaza Final Environmental Impact Report Excerpts at 7); RT 25:14-19; 27:21-28:27; 29:9-15; 113:5-13. At the time the project was approved, Broadway was generally regarded as the northern boundary of the downtown area. RT 123:16:24. Levi's Plaza is considerably north of Broadway. See Appendix C.

[13] Approval Resolution For Wharf Park Residential Project, Exhibit 19, Para. 6, adopted June, 1979. See Appendix C for location.

[14] See note 9, *supra*. Rai Okomoto, City's then Planning Director, testified:

Question (by Mr. Ellman, counsel for BJEW):

All of these uncertainties were compounded by City's long-standing "transit-first" policy—a policy that had been in place and implemented in several ways long before Levi's Plaza was proposed. The "transit-first" policy discourages the use of private automobiles by commuters in the hopes of compelling urban employees to utilize public transportation.[15] For example, City prohibits construction of parking garages in its office commercial areas, does not allow new buildings to provide parking to serve the needs of commuters, and mandates the imposition of parking fees that discriminate against all-day parkers. *These policies are expressly intended to increase the burden on transit wholly apart from new construction.*[16]

Enacted more than two years after City considered and approved Levi's Plaza, the TIDFO effectively redefined the impact on transit the project supposedly caused, redrew the boundaries of the area impacted—and crystallized a vague concept into a precise and formidable exaction. Instead of focusing on the Northeast Waterfront, it defined impacts in terms of an expansive Downtown Area. Levi's Plaza falls within the newly defined Downtown Area only through creation of an improbable extrusion

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> The first phrase of this [paragraph 5(c) of Exhibit 2, the exaction condition] refers to 'a good faith effort'. . . . What is the understanding that you had in the Planning Department of the meaning of that term in an approval resolution?

Answer:

> I think again at that time this relationship between development and transportation was just beginning to be understood as a significant phenomenon, if you will, in the course of planning, and I think that we felt at the time, and I believe the Commission agreed, which is undoubtedly why they adopted this language, *that we hadn't provided enough evidence that could lead us to make it a mandatory requirement that developers assume some burden of the impact on transit.* The phrase "good faith effort", was in effect then a kind of compromise. . . . RT 104:7-105:7.

[15] See, *e.g.*, RT 168:22-169:8; San Francisco Master Plan Transportation Element pp. I.4.9, 11, 13; II.1.38, 40.

[16] RT 179:19-28. [Admission by Assistant Director of Planning.]

from the traditional northern boundary of the City's urban core.[17] Instead of dealing with transit impact generally, the TIDFO focuses solely on the impact caused by "cumulative" office development.[18] Rather than creating an assessment on all benefited property—as would be the case with an assessment district—it lays the entire burden on new construction. And from a "general and amorphous"[19] idea, insufficiently specific to create mandatory obligation and contemplating a "good faith effort to participate . . .", it creates a specific, mandatory and substantial fee.[20]

City did all this with a *legislative enactment,* making its determination apply to all office buildings by virtue of their proposed use and location. The TIDFO provides no mechanism for defining the impact or the mitigation by reference to the specific attributes of specific projects. The TIDFO did not purport to address Levi's Plaza or the findings that had been made in the environmental impact report for that project. It simply threw the project into the basket with the others, relying on a provision that made the fee apply to all projects that had a "future funding mechanisms . . ." provision in their approval resolutions.

The California courts have now held that *Nollan* does not apply to the foregoing facts. Believing that result to be wrong and a violation of its constitutional right to just compensation, BJEW petitions this Court for certiorari.

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[17] Appendix C.

[18] TIDFO, Ex. 5. The purpose of the TIDFO is summarized in *Russ Building Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 844-45, 244 Cal. Rptr. 683-84, 750 P.2d 324, 325-26 (1988). *Russ Building* held that the TIDFO could be applied to two projects approved later than Levi's Plaza but prior to enactment of the TIDFO, based on language in approval resolutions that differs substantially from that contained in the approval resolution for Levi's Plaza. The Court in *Russ Building* refused (apparently on procedural grounds) to apply *Nollan* to the facts before it. See 44 Cal.3d at 845, n.6.

[19] See note 9, *supra.*

[20] See note 15, *supra.*

ARGUMENT

A. The California Court of Appeal Wrongly Concluded That *Nollan* Applies Only To "Possessory Takings" and Not "Regulatory Takings" Cases.

The California Court of Appeal states its conclusion in the first paragraph of its opinion:

> In this action we consider whether the heightened scrutiny test alluded to in *Nollan* . . . should be applied to the [*TIDFO*] . . . . *We conclude the Nollan analysis is applicable only to "possessory takings," rather than "regulatory takings," and does not apply to the TIDF.*

3 Cal.App.4th at 166, 4 Cal. Rptr. 2d at 115.

As a preliminary matter, we submit that if a recent, landmark interpretation by this Court of the Fifth Amendment of the United States Constitution is to be limited, *it is for this Court,* not the California Court of Appeal, to make that determination. As it happens, this Court explicitly rejected the Court of Appeal's limiting postulate in an opinion filed 60 days later.[21]

Yee v. Escondido, 60 U.S.L.W. 4301 (April 1, 1992) defines the difference between "possessory takings" and "regulatory takings" as follows:

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[21] The error in the Court of Appeal's conclusion is obvious on the face of the *Nollan* opinion. For example:

> In *Loretto* (*Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982)), we observed that where governmental action results in "[a] permanent physical occupation of the property, by the government itself or by others, see 458 U.S., at 432-433, n.9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *id.,* at 434-435. *Nollan,* 483 U.S., at 831-32.

The Court concluded that the "permanent physical occupation" analysis did *not* apply to the facts before it. If *Nollan* was truly a possessory takings case, then this Court could have cited *Loretto, supra,* and *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) and left the matter at that.

> . . . The government effects a physical taking only where it *requires* [emphasis in original] the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation." *FCC v. Florida Corp.*, 480 U.S. 245, 252 (1987). Thus whether the government floods a landowner's property, *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872), or does no more than require the landowner to suffer the installation of a cable (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)), the Takings Clause requires compensation if the government authorizes a compelled physical invasion of property.

Such compulsion is lacking, however (and the case becomes a "regulatory takings" case), if the imposition occurs as a result of voluntary action on the part of the property owner.[22]

The Court applied "regulatory takings" analysis to *Yee* because the condition of which Yee complained was imposed upon the conduct of a business that he could discontinue,[23] as the plaintiffs in *Nollan* and in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980), could have avoided the impositions of which they complained by electing not to engage in the activities that triggered them. The Nollans could have avoided dedicating the offensive easement by electing not to take the benefits of the permit restricted by the easement condition. PruneYard could have excluded unwanted political solicitors by ceasing to engage in the commercial activity found to have invited them.

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[22] Cf. *Nollan*, 483 U.S., at 834.

[23] *Yee*, 60 U.S.L.W., at 4303:

> But the Escondido rent control ordinance, even when considered in conjunction with the California Mobilehome Residency Law, authorizes no such thing [requirement of physical invasion]. Petitioners *voluntarily* rented their land to mobile home owners. At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants . . . (Citation). *Put bluntly, no government has required any physical invasion of petitioners' property. Petitioners' tenants were invited by petitioners, not forced upon them by the government.* (Citation).

Here, BJEW complains of a condition attached to a permit. The condition *regulates* the exercise of a *right*, i.e., the right to use its property for a specific purpose.[24] As in *Yee, Nollan, PruneYard* and other "regulatory takings" cases, BJEW could have avoided the imposition by electing not to proceed.

In short, the conclusion of the California Court of Appeal on the pivotal issue in this case is inescapably wrong, flying in the face of rationale often repeated in opinions of this Court on issues of taking that were restated with emphatic clarity in *Yee.*[25] *Nollan* is a regulatory takings case.

Setting aside the clear error in its use of terminology, it is possible that the Court of Appeal intended to limit *Nollan* to those cases where the government exacts an interest in the regulated land rather than payment of a fee or the imposition of another form of burden on the right to use property. Such a limitation is equally wrong. We deal with it in the next sections of Argument.

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[24]
> . . . the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit."

Nollan, 483 U.S., at 834, n.2.

[25] The Court of Appeal relied on *Commercial Builders v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991) *cert. denied,* 60 U.S.L.W. 3782 (1992) which reached a similar result on similar reasoning. *Commercial Builders* deals with a *facial attack* on the constitutionality of an ordinance requiring developers of commercial buildings to contribute funds for low cost housing. In a facial attack, the plaintiff must establish that there is no state of facts to which the ordinance can be constitutionally applied. *Keystone Bituminous Coal, Association v. DeBenedictis,* 480 U.S. 470 (1987). This is not a facial attack case. This case went to trial and must be decided on its facts.

B. The Fifth Amendment Protects Property Owners From Excessively Burdensome Restriction On The Use Of Property: It Requires Compensation If The Burden Exceeds That Which The Individual Should Be Required To Bear.

1. Takings Are Determined By The Impact On The Property Owner. The Nature Of The Interest Taken Does Not Control.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the Court stated:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[26]

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-5 (1984), the Court quoted *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), as follows:

> . . . [C]ourts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

A regulation may advance a legitimate State interest and still constitute a taking. Police power regulations that fail to advance a legitimate public purpose are void for that reason alone. Thus, the fact that the TIDFO may have a valid purpose—funding for enhanced public transit—does not end the inquiry. It answers only the first portion of the threshold question, nothing more. Once the government establishes the facial legitimacy of its action, the focus shifts to the opposite pan of the balance, i.e., the impact of the regulation on a particular property owner based on the facts of that specific case.[27]

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[26] See also *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987).

Nollan deals with the problem created by a particular class of regulatory takings cases, those in which the government imposes conditions upon the issuance of a permit.[28] The Court held that a regulatory condition goes "too far"[29] in imposing a burden upon a property owner unless the condition directly alleviates an impact the proposed project would otherwise cause and that would have justified a refusal to approve the project without the mitigating condition. Unless so constrained—in the absence of such a nexus — the condition does not substantially advance a legitimate state interest and it exceeds the constitionally permissible burden government can impose upon a property owner without payment of just compensation.

The issue posed by this case is whether or not that doctrine applies *only* to conditions that require a property owner directly to give away an interest in the permitted property itself. In so holding, the Court of Appeal necessarily concluded that *this*

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[27] This Court has repeatedly stated that takings cases must be decided on their particular facts. See, *e.g., Keystone Bituminous Coal Association v. DeBenedictis,* 480 U.S. 470, 492-93, 495 (1987); *Connolly v. Pension Benefit Guaranty Corporation,* 475 U.S. 211, 224 (1986); *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Penn Central Transportation Company v. New York City,* 438 U.S. 104, 138 (1978).

[28]

> Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome . . . . Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter.

Nollan, 483 U.S., at 834.

[29] *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 413, 415 (1922).

Court would have found no infirmity in a condition requiring the Nollans to pay a fee to acquire the very easement they could not be required to dedicate. The conclusion is illogical, unsupported by any authority and plainly contrary to this Court's conclusion that ". . . the Fifth Amendment's Property clause . . . [is] more than a pleading requirement, and compliance with it . . . [is] more than an exercise in cleverness and imagination." *Nollan,* 483 U.S., at 841.

2. The Fifth Amendment's Just Compensation Requirement Applies Equally To Cash Exactions As It Does To Land Dedication Requirements.

It is the burden imposed upon the exercise of property rights that must be tested by constitutional formulations stated by this Court. The *nature* of the exaction does not determine the *extent* of the burden, nor should it be used as the yardstick to determine when governmental action has gone "too far" and traversed the takings threshold.

The concept of property protected by the Fifth Amendment's just compensation requirement is not a sterile or rigid concept, restricted to interests in land. To the contrary, this Court has recognized that "property" encompasses a vast range of fundamental rights protected by the Constitution although not defined by it.[30]

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[30] "[W]e are mindful of the basic axiom that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"" *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 161 (1980), quoting in turn from *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972)).

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) states:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

This oft-quoted statement echoes teachings of the Framers as well as their antecedents. For example, James Madison wrote of "property:"

> This term in its particular application means: "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."
>
> In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*. (Emphasis in original).
>
> In the former sense, a man's land, or merchandise, or money is called his property.
>
> In the latter sense, a man has property in his opinions and the free communication of them.
>
> He has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.
>
> He has property very dear to him in the safety and liberty of his person.
>
> He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.
>
> In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.

> Where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties or his possessions.

G. Hunt, VI *The Writings of James Madison* at p.101 (The Knickerbocker Press, 1906), (quoting from *The National Gazette*, March 29, 1792).[31]

The Fifth and Fourteenth Amendments[32] do not differentiate between types or classes of property interest, nor do they suggest that money is entitled to less protection than land.

This Court has consistently used the same verbal formula in its regulatory takings cases without regard to the type of interest being regulated—and allegedly taken. For example, see ***Webb's Fabulous Pharmacies, Inc. v. Beckwith,*** 449 U.S. 155 (1980) (an excessively burdensome fee); ***Andrus v. Allard,*** 444 U.S. 51 (1979) (regulation of the sale of bird feathers); ***Ruckelshaus v. Monsanto Co.,*** 467 U.S. 986 (1984) (regulation of intellectual property rights in chemicals registered by the EPA); ***Connolly v. Pension Benefit Guaranty Corporation,*** 475 U.S. 211 (1986) (regulation of monetary rights under ERISA).

The Court's opinions in these cases provide no support for a distinction in takings analysis based upon the nature of property required to be given up. For example, ***Connolly*** takes pains to reconcile its opinion with a list of regulatory takings cases that includes ***Loretto*** and ***Kaiser Aetna***. See ***Connolly,*** 475 U.S., at 224. ***Loretto*** and ***Kaiser Aetna*** are both cases where the government took a possessory interest in land. The regulation attacked as a taking in *Connolly* was a provision of ERISA imposing a monetary liability in the operation of pension trust funds.

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[31] See also, John Locke, TWO TREATISES OF GOVERNMENT (P. Laslett, rev.ed. 1988, Section 124, Sections 201, 202 ("Whenever the Legislators ***endeavor to take away and destroy the Property of the People*** . . . they put themselves into a state of War with the People who are thereupon absolved from any farther obedience." (Emphasis in original)).

[32] "[N]or shall *private property* be taken for public use, without just compensation."

Connolly also cites *Ruckelshaus* as part of the authoritative line of takings cases that includes *Loretto* and *Kaiser Aetna*. *Ruckelshaus*, an intellectual property regulation case, in turn cites and relies upon land use regulation cases including *PruneYard*, a regulatory takings case—but a case where the regulation required a certain type of physical invasion of real property as a condition to its use for certain purposes. And to complete the circle, *Ruckelshaus* is cited and relied upon by *Nollan* (another regulatory taking, land invasion case) as articulating the controlling "regulatory takings" formula. 483 U.S., at 833 n.2.

The Court of Appeal quoted a portion of the *Nollan* opinion attempting to support its conclusion that the "heightened scrutiny" required by the case applies only to conditions that exact interests in the regulated land. 3 Cal.App.4th, at 169. The entire passage in which that sentence occurs is as follows:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. [Emphasis in original]. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

483 U.S., at 841.

This language, we submit, says nothing more than that dedication requirements (as opposed to cash conditions) should be viewed with greater suspicion *because they are more likely to be illegal*, not because land gets more constitutional protection than money.[33]

C. As Applied To Levi's Plaza, The TIDF Plainly Fails The Substantial Advancement Test Required By Nollan.

Intense analytical scrutiny is not needed to show that the TIDFO—applied to Levi's Plaza *on the facts of this case*—fails both parts of the *Nollan* substantial advancement test.

Nollan begins with the proposition that if a public purpose justifies the imposition of a regulation prohibiting exercise of a right to develop the subject property, then the property owner can raise no constitutional objection to a regulation that directly serves the same end while allowing development to proceed. *A justifiable building ban* provides the starting point. 483 U.S., at 836.

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[33] The second piece of *Nollan* to which the Court of Appeal might have referred is:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. . . . We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

(Citing *Loretto* and *Kaiser Aetna*). *Nollan*, 483 U.S., at 831. This passage is preliminary to the main argument, stating a premise in response to Justice Brennan's dissent. It does not suggest that exaction of an interest in the regulated real estate or "the right to exclude others" is *essential* to a finding of a taking or to the "substantial advancement" rationale the Court adopted to define the takings threshold. We have long passed the point where it could seriously be argued that no regulation can go "too far" unless it deprives the property owner of a right to exclude others. See, *e.g.*, *Lucas v. South Carolina Coastal Com.*, 60 U.S.L.W. 4842 (June 29, 1992); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Connolly v. Pension Benefit Guaranty Corp.*, *supra; Andrus v. Allard*, *supra; Agins v. Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Company v. New York City*, 438 U.S. 104 (1978).

Here, City cites impact upon public transit as its justification. At the time City considered and approved Levi's Plaza, however, it could not define the impact, it had no mitigation (building ban or otherwise) in mind and its planning staff had no idea whether, at what point and in what form it would resolve these issues.[34] On this state of facts, we submit that City could not lawfully have banned construction of Levi's Plaza because of its potentially "general and amorphous" impact on public transit.

Once it is established that "... the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'" [*Nollan*, 483 U.S., at 834, n.2], it should be clear beyond argument that a regulation prohibiting development must have a stronger base than that advanced here. Thus, City's effort to apply the TIDF to Levi's Plaza, *viewed as of the time the project was considered and approved on its specific facts*, fails at the first hurdle of the *Nollan* test.

The question remains whether City cured this defect by the "findings" in the TIDFO. Being unable to find a potential impact on transit sufficient to justify a regulatory ban on the right to construct Levi's Plaza when the project was before it, can City create a justification by legislative findings—adopted to apply generally and without regard to the specific attributes of the project—two years after the fact? *Lucas* suggests not.[35] Even without that suggestion, however, the question does not raise serious analytical difficulties.

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[34] See notes 9 and 16, *supra*.

[35] In *Lucas*, the State of South Carolina claimed the right to prohibit use of certain property for its only economic beneficial purpose without payment of just compensation based upon a general legislative finding that such uses would constitute a nuisance. This Court rejected the idea

Plainly, no permit reservation can expand the scope of what is constitutionally permissible under *Nollan*, nor can the City create additional regulatory conditions after vested rights have accrued. So the permitting authority is bound by the more restrictive of the answers to the following questions: Was the imposition fairly contemplated within the permit reservation? And, if so, does the imposition meet the *Nollan* test?

In this case, the California Courts rejected the second question altogether. They then applied California's loose and forgiving interpretive approach to the former. They allowed general, legislative findings to supersede the specific fact-findings of the project approval process. We know from this record that when Levi's Plaza was approved, City viewed transit impact as an attribute of project *location* in the Northeast Waterfront of the City and not as an attribute of office use.[36] If City considered transit impact an

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that such a nuisance finding could properly be made by generally applicable legislative enactment. 60 U.S.L.W. at 4842.

[36] See note 13, *supra*. At trial, City's witnesses sought to explain away the references in this record to the Northeast Waterfront by testifying that enhanced bus service to the Northeast Waterfront benefits other areas of the City because the buses move from place to place, etc. RT 101:17-102:12; 134:4-10; 136:23-27. This testimony was advanced to show that references to the "Northeast Waterfront" should be construed to include the entire "Downtown Area" (redefined in the TIDFO to include virtually the entire eastern third of City) because the bus routes extend into those areas. The argument perfectly exemplifies Humpty Dumpty's rule: "When I use a word, it means just what I choose it to mean—neither more nor less." L. Carroll, *Through the Looking Glass and What Alice Found There*, Chapter 6. Because if the Northeast Waterfront (the "area of the City in which the project is located . . . " [Exhibit 2, paragraph 5(c)] is defined to include anywhere the buses go, the phrase means anything that the maker of the bus routes chooses to

attribute of office use, it would not have imposed a transit impact condition on a residential project in the Northeast Waterfront area in the very next action it took in which it imposed a transit condition on the approval of any project anywhere.[37]

Nor does the language of the permit condition calling for a "good faith effort to participate" contemplate a mandatory fee. That language calls for affirmative participatory action on the part of BJEW—as would be required to form an assessment district—the only funding mechanism under discussion at the time Levi's Plaza was approved.

The TIDFO does not deal specifically with the conditions of Levi's Plaza. It makes general findings that cumulative *office* development in a broadly defined Downtown Area impact transit and require payment of a $5 mandatory fee. No participation by property owners is required other than to write and deliver a check. The TIDFO redefines the impacted area, the nature of the impact and the funding mechanism as perceived at the time of Levi's Plaza.

City and the California Courts have shrugged all this off on the grounds that Levi's Plaza had an impact on transit and the approval resolution condition gave City the right to redefine that

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make it mean—in this case, two years after the fact in aid of City's quest for funds.

[37] The Wharf Park approval is also the law of the City. See note 4, *supra*. City's actions closest in time after Levi's approval provide highly probative evidence of its intent. See, *e.g.*, *United States v. Stewart*, 311 U.S. 60, 64-65 (1940):

> . . . The later act can therefore be regarded as a legislative interpretation of the earlier act (citations) in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting. *It is therefore entitled to great weight in resolving any ambiguities and doubts.*

See also, *Atlantic Coast Line Railroad Co. v. Phillips*, 332 U.S. 168 (1947); *Erlenbaugh v. United States*, 409 U.S. 239 (1972).

impact in any terms that might fit within the broadest definition of "future funding mechanism . . . " At best, this is nothing more than the "indirect relationship" approach explicitly rejected in *Nollan.*[38] At worst, the northern boundary of the "Downtown Area" as defined by the TIDFO—with its sharp-edged bulge reaching more than four blocks to take in Levi's Plaza—punctuates, we submit, City's "'. . . out-and-out plan of extortion.' (Citation)." *Nollan,* 483 U.S., at 837.

We agree that Condition 5(c) in the Levi's Plaza approval resolution deals with transit as does the TIDFO. More than that is required, however, for the TIDFO to apply to Levi's Plaza. As this Court observed, some sort of condition dealing with "visual access" might have been constitutionally permissible in Nollan. 483 U.S., at 835. The access condition selected by the Commission, however, was not—because it did not alleviate a burden caused by the Nollans' project.

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[38] In *Nollan,* the California Court of Appeal stated its conclusion as follows:

> In *Grupe v. California Coastal Com.,* (1985) 166 Cal.App.3d 148, 165, 212 Cal.Rptr. 578, the court construed the leading California case on the constitutionality of exactions, (citation) to hold that only ***an indirect relationship between*** an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning . . . .The Court in *Grupe* held that the access condition was related to a need for pubic access to which Grupe's project contributed, even though standing alone it had not created the need for access. . . . .

223 Cal.Rptr. 28, 30 (1986).

It is precisely this "indirect relationship" formula that this Court rejected. 483 U.S., at 838, 841. Despite that rejection, it is precisely the same indirect, general relationship that the Court of Appeal has used in this case.

Fifth Amendment "just compensation" cases are decided on their particular facts.[39] In no class of cases can that be more clear than those where permit conditions must directly mitigate impacts on the public interest that (i) a proposed project would otherwise cause and that (ii) would be sufficient to justify prohibiting development of the project in the first instance. We doubt that a fact specific requirement of this sort can be met by a generally applicable legislative enactment adopted two years after the fact. Such a conclusion is particularly compelling when the enactment purports to crystalize the pivotal issues of impact, mitigation and public interest that City admits it could not resolve when it was engaged in the very fact-finding exercise upon which the validity of the imposition in this case must depend.[40]

We submit that if the nature and extent of an imposition such as a regulatory fee is reserved for future determination, that determination must meet the same constitutional standards articulated in the *Nollan* case that would have been required at the time the permit was issued. It must be based on the same facts and the same public interest considerations. The City must be able to show that the condition substantially advances a legitimate interest that would have justified a regulation prohibiting development of the project in the first place. And the condition reserving that judgment to a future date must precisely spell out the public interest to be served, the impact to be alleviated and the type of mitigation that would achieve the purpose.

None of that happened here, nor did the California Courts require it. They rejected *Nollan* entirely and did not get past the general concept of "transit." In so doing, they vindicated City's demand for $3,100,000.

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[39] See authorities cited at note 28.

[40] Issuance of a permit for a project such as Levi's Plaza is an exercise in administrative adjudication to which the requirements of due process apply. See, *e.g.*, *Horn v. County of Ventura*, 24 Cal.3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134 (1979); *Ward v. County of Riverside*, 273 Cal.App.2d 353, 78 Cal. Rptr. 46 (1969).

Nollan applies—and it requires more than City could or did show to sustain the TIDFO exaction against Levi's Plaza.

CONCLUSION

The California Court of Appeal erred when it rejected *Nollan* as precedent for resolution of this case. In holding that *Nollan* does not apply to a monetary imposition, the California Court of Appeal drastically and erroneously limited a landmark opinion of this Court.

This Court should issue a writ of certiorari to reverse the result below and hold that *Nollan* applies to monetary exactions imposed as conditions upon the issuance of permits; and that the imposition in this case fails the substantial advancement test *Nollan* articulates.

Dated: July 14, 1992

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(APPENDICES FOLLOW)

APPENDIX A

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

FILED JANUARY 31, 1992

BLUE JEANS EQUITIES WEST,
Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO,
Defendant and Respondent.

A051759
(Super. Ct. No. 814330
San Francisco County)

WHITE, P.J. In this action we consider whether the heightened scrutiny test alluded to in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (hereafter *Nollan*) should be applied to San Francisco's Transit Impact Development Fee (TIDF) Ordinance. (Ord. No. 224-81, codified at S.F. Admin. Code, § 38.1 et seq.) We conclude the *Nollan* analysis is applicable only to "possessory takings," rather than "regulatory takings," and does not apply to the TIDF.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Blue Jeans Equities West is the owner and developer of Levi's Plaza, a five-building office, retail and condominium complex in the north or northeast waterfront section of San Francisco. This area of San Francisco is located away from the financial district, the traditional area of downtown office space. At the time of the project's conception, the main tenant was to be Levi Strauss & Company, which was then located in the financial district of the city. Prior to construction of the complex, a final environmental impact report was prepared by the San Francisco

Department of City Planning. Among other things, the report discussed the adverse impact the project would have on transportation.[1]

The permit for Levi's Plaza was approved by the San Francisco Planning Commission's Resolution No. 8142 on January 4, 1979. The resolution contained a condition in its transit mitigation section, designated as paragraph 5(c), which provided: "The owner of the project shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located."

On May 5, 1981, the San Francisco Board of Supervisors enacted the TIDF ordinance. As our Supreme Court described it: "The ordinance, which became effective the following month, requires developers of downtown buildings containing new office space to pay a TIDF as a condition of issuance of a certificate of completion and occupancy. [Citation.] The TIDF, not to exceed $5 per square foot of new office space, provides revenue for the municipal railway to offset the anticipated costs of the increased peak-period ridership generated by the new office space over the useful life of each office building." [Citation.]" (*Russ Bldg. Partnership v. City and County of San Francisco* (1988) 44 Cal.3d 839, 844-845 (hereafter *Russ II*).) At the time of its enactment, plaintiff had not yet received a certificate of completion for Levi's Plaza.

Plaintiff filed a complaint for declaratory relief against the city, contending the TIDF ordinance is unlawful and invalid as applied to the Levi's Plaza project and the TIDF may not be imposed with respect to plaintiff. While the case was pending, the parties stipulated to the fee calculation and plaintiff deposited the agreed amount, over $3.1 million, in trust, pending the case's outcome.

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[1] The report states in pertinent part: "Employees arriving by BART, AC Transit, SAMTRANS, Southern Pacific, and the ferries would have to transfer to another mode (MUNI) to reach the project site. The proportion of vehicle drivers among Levi Strauss employees would tend to increase from about 16% to about 17.5%. Sixteen additional bus runs on Routes 15/42 and 32 would have to be operated during the peak hour to provide adequate capacity to sustain the 17.5% vehicle-driver modal split. This would represent about 4-minute headways on the combined 15 and 42 routes and about 6-minute headways on Route 32."

The trial court entered judgment for defendant, finding that the TIDF ordinance is not an unconstitutional "taking" on its face or as applied to plaintiff, plaintiff acquired no vested right to build or use Levi's Plaza without payment of the TIDF, and defendant is not estopped from requiring plaintiff to pay the TIDF. This appeal followed.

DISCUSSION

In *Russ Bldg. Partnership v. City and County of San Francisco* (1987) 199 Cal.App.3d 1496 (hereafter *Russ I*), Division Five of this District held the San Francisco TIDF ordinance was a valid development fee, which could not be challenged under articles XIII A and XIII B of the California Constitution or the equal protection and due process clauses of the federal and state Constitutions. In eesence, the opinion finds the TIDF a fee, rather than a special tax. (*Id.*, at p. 1507.)

In *Russ II*, the Supreme Court addressed the question of whether the TIDF ordinance could be applied to projects which, at the time of the enactment of the ordinance, were in the course of construction pursuant to building permits conditioned on the developers' participation "in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service . . . ." (*Russ II, supra,* 44 Cal.3d at p. 843.)[2] The high court concluded that the condition encompassed the TIDF, and held that the TIDF could be imposed on the projects without impairing the developers' vested rights. (*Ibid.*) However, the *Russ II* court expressly declined to address whether the TIDF violated the takings clause of the United States Constitution, as interpreted in *Nollan*. (*Russ II, supra,* 44 Cal.3d at p. 845, fn. 6.)

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[2] *Russ II* left intact the *Russ I* holding that the TIDF was a valid development fee. (*Russ II, supra,* 44 Cal.3d at p. 845.)

In *Nollan*, the United States Supreme Court held the California Coastal Commission had violated the Fifth Amendment by conditioning a building permit for beachfront property on the owners' dedication of an easement allowing the public to walk on the portion of the property nearest to the ocean. The condition requiring an easement violated the "taking" clause, because it did not serve a governmental purpose related to the permit to rebuild. (*Nollan, supra*, 483 U.S. at p. 838.) At least one California court has interpreted the *Nollan* holding as providing "there must be a substantial connection, or 'nexus' between the public burden created by the construction and the necessity for the easement." (*Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal.App.3d 1260, 1267, fn. omitted). This interpretation is based, in part, on footnote 3 of the *Nollan* opinion: "[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, [citation], not that 'the State *"could rationally have decided"* that the measure adopted might achieve the State's objective.' [Citations.]" (*Nollan, supra,* 483 U.S. at pp. 834-835, fn. 3.)

A threshold issue is whether the *Nollan* nexus test should be applied to the case at bench. Plaintiff takes an affirmative position, while defendant disagrees.

It is settled that any regulation of economic interests which "goes too far" becomes a "taking" under principles of inverse condemnation. (*Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415; *First Lutheran Church v. Los Angeles County* (1987) 482 U.S. 304, 316; *Golden Cheese Co. v. Voss* (1991) 230 Cal.App.3d 727, 731.) However, there is no set formula for determining what constitutes a "taking"; the courts rely instead on ad-hoc, factual inquiries into the circumstances of individual cases: (*Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 U.S. 211, 224; *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-124.)

In *Agins v. Tiburon* (1980) 447 U.S. 255, the United States Supreme Court stated: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, [citation], or denies an owner economically viable use of his land, [citation]. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest." (*Id.*, at p. 260). *Nollan* has been construed as refining the first prong of the *Agins* test "to require that the regulation advance the precise state interest which avowedly motivated it." (*Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1029.)

However, the high court appears to make a distinction between "regulatory taking," i.e., economic regulation, most forms of zoning, and other restrictions on land use, and "possessory takings," where the government, or an authorized third person, physically intrudes upon or appropriates the property. (See Manheim, *Tenant Eviction Protection and the Takings Clause*, 1989 Wis. L.Rev. 925, 939.)

Nollan specifically points out that "our cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Nollan, supra*, 483 U.S. at p. 841, emphasis in original.) Based on this language, most legal scholars have concluded the *Nollan* strict scrutiny approach is limited to unconstitutional conditions and possessory takings cases. (See, e.g., Manheim, *supra*, 1989 Wis. L.Rev. at p. 950; Lawrence, *Means, Motives, and Takings; The Nexus Test of Nollan v. California Coastal Commission* (1988) 12 Harv. Envtl. L.Rev. 231, 263; but see Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine* (1991) 91 Colum. L.Rev. 473.)

Case law subsequent to *Nollan* appears to confirm this view. *Pennel v. San Jose* (1988) 485 U.S. 1, concerns a city rent control ordinance that permits consideration of "hardship to a tenant" when determining whether to approve a rent increase proposed by a landlord. In addressing whether rent control was *per se* a taking the court stated: "[W]e have 'consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulations entails.' " (*Id.*, at p. 12, fn. 6, quoting *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 440.) *Pennell* appears to reaffirm the traditional view that as long as governmental regulations do not require a landowner to suffer the physical occupation of a portion of his real estate, the regulations will be analyzed as nonpossessory governmental activity. (See *Loretto, supra,* 458 U.S. at p. 440.)

More on point, in *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, commercial developers challenged a city ordinance that conditioned nonresidential building permits on payment of a fee to offset burdens associated with the influx of low-income workers to work on such developments. The developers argued that pursuant to *Nollan*, an ordinance that imposes an exaction on developers can be upheld only if it can be shown that the development is directly responsible for the social ill that the exaction is designed to alleviate. Citing *St. Bartholomew's Church v. City of New York* (2nd Cir. 1990) 914 F.2d 348, 357, fn. 6, *Adolph v. Federal Emergency Management Agency* (5th Cir. 1988) 854 F.2d 732, 737, and *Naegele Outdoor Advertising, Inc. v. City of Durham* (4th Cir. 1988) 844 F.2d 172, 178, the Ninth Circuit concluded *Nollan's* heightened scrutiny test was inapplicable to regulations that do not constitute a physical encroachment on land. (*Commercial Builder, supra,* 941 F.2d at p. 874.)

Plaintiff principally relies on *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, to support its claim that a heightened scrutiny test should be employed. In *Bixel,* a developer was required to pay a fire hydrant fee as a condition of the issuance of a building permit. The fee was established by two city ordinances. The developer argued that the fee was a special tax, which violated article XIII of the California Constitution. The Court of Appeal agreed, holding that the fire hydrant fee ordinances did not contain language embodying the required constitutional safeguards which must be employed in fashioning a valid development fee.[3] (*Id.*, at p. 1220.) *Bixel* neither considered nor decided whether the fee constituted a taking in violation of the Fifth Amendment. *(Ibid.)*

In light of the above-quoted language in *Nollan* and post-*Nollan* case law, we hold that any heightened scrutiny test contained in *Nollan* is limited to possessory rather than regulatory takings cases.

Plaintiff also contends condition 5(c) of its building permit did not contemplate payment of the TIDF. First, it submits the language of the condition, i.e., "the owner . . . shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located," denotes a voluntary rather than mandatory obligation.[4] We disagree. Good faith performance of a contract "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1393, fn. 15, quoting Rest.2d Contracts (Tent. Draft Nos. 1-7) § 231, com. a.) Thus, the "good faith" language in condition 5(c) may not be employed to make plaintiff's participation discretionary.

Plaintiff next asserts the condition was devoted to improving transit service "to the area of the city in which the project is located." It points out this condition was identical with the permit conditions for Wharf Park I and II, which are residential projects.[5] Plaintiff compares this language with the articulated purpose of the TIDF ordinance and the wording contained in the permits for projects considered in *Russ I*, and concludes the commitments were different. We find the argument unpersuasive.

---

[3] The *Bixel* court explicitly distinguished the imprecise basis for determining the fee in that case with the methodology employed and described in *Russ I.* (*Bixel, supra,* 216 Cal.App.3d at p. 1219.)

[4] In its statement of decision, the trial court stated: "The Court further finds that the phrase 'good faith effort' was not included to allow mere voluntary participation in the support of transit funding mechanisms, but anticipates BJEW's participation in whatever funding mechanism the City and County could best devise that reasonably met the requirements of the transit demands. The phrase does not connote the mandatory language of 'shall,' however, such mandatory language was not necessary. The phrase was intended to acknowledge notice of an obligation to participate in whatever reasonable funding mechanism was devised."

The TIDF ordinance was enacted "[i]n order to be able to provide public transit services for new development in the Downtown Area, . . . [¶] It is the purpose of this ordinance to require developers of new development in the Downtown Area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway both for initial capital outlay for the acquisition of rolling stock and the construction of facilities; and for the long term operation, maintenance and replacement of those facilities once they are in place." (S.F. Admin. Code § 38.3.) Each of the plaintiffs in *Russ I* and *Russ II* had, as a condition of its building permit, the following language: "In recognition of the need for expanded transportation services to meet peak demand generated by cumulative office development in the downtown area, [the developer] shall participate in a downtown assessment district, or similar fair and appropriate mechanism, to provide funds for maintaining and augmenting transportation service, should such a mechanism be established by the City." (*Russ II, supra,* 44 Cal.3d at p. 844.) While the wording of the condition contained in the *Russ* plaintiffs' permits differs from that in condition 5(c), our Supreme Court found the conditions substantially similar. (*Id.*, at p. 844, fn. 2.)

---

[5] The Levi's Plaza approval provided that plaintiff "shall make a good-faith effort to develop . . . housing on a nearby site, for low- and moderate-income occupants." Plaintiff complied with this provision by building Wharf Park I and II, residential projects located between Levi's Plaza and Pier 39.

The fact that Levi's Plaza is located away from the traditional downtown area does not alter our view that the project is subject to the TIDF. Plaintiff stipulated that the project is within the geographic downtown area as defined by the ordinance. Plaintiff had notice that its development would adversely impact on public transportation and agreed to participate in funding mechanisms to assure adequate transit service to its project.

DISPOSITION

The judgment is affirmed.

White, P. J.

We concur:

Merrill, J.

Werdegar, J.

Blue Jeans Equities West v. City and County of San Francisco
A051759

Trial Court: San Francisco County
Superior Court

Trial Judge: Daniel M. Hanlon

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APPENDIX B

First Appellate District, Division Three, NO. A051759
S025468

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

Blue Jeans Equities West,
Appellant
v.
City & County of San Francisco,
Respondent

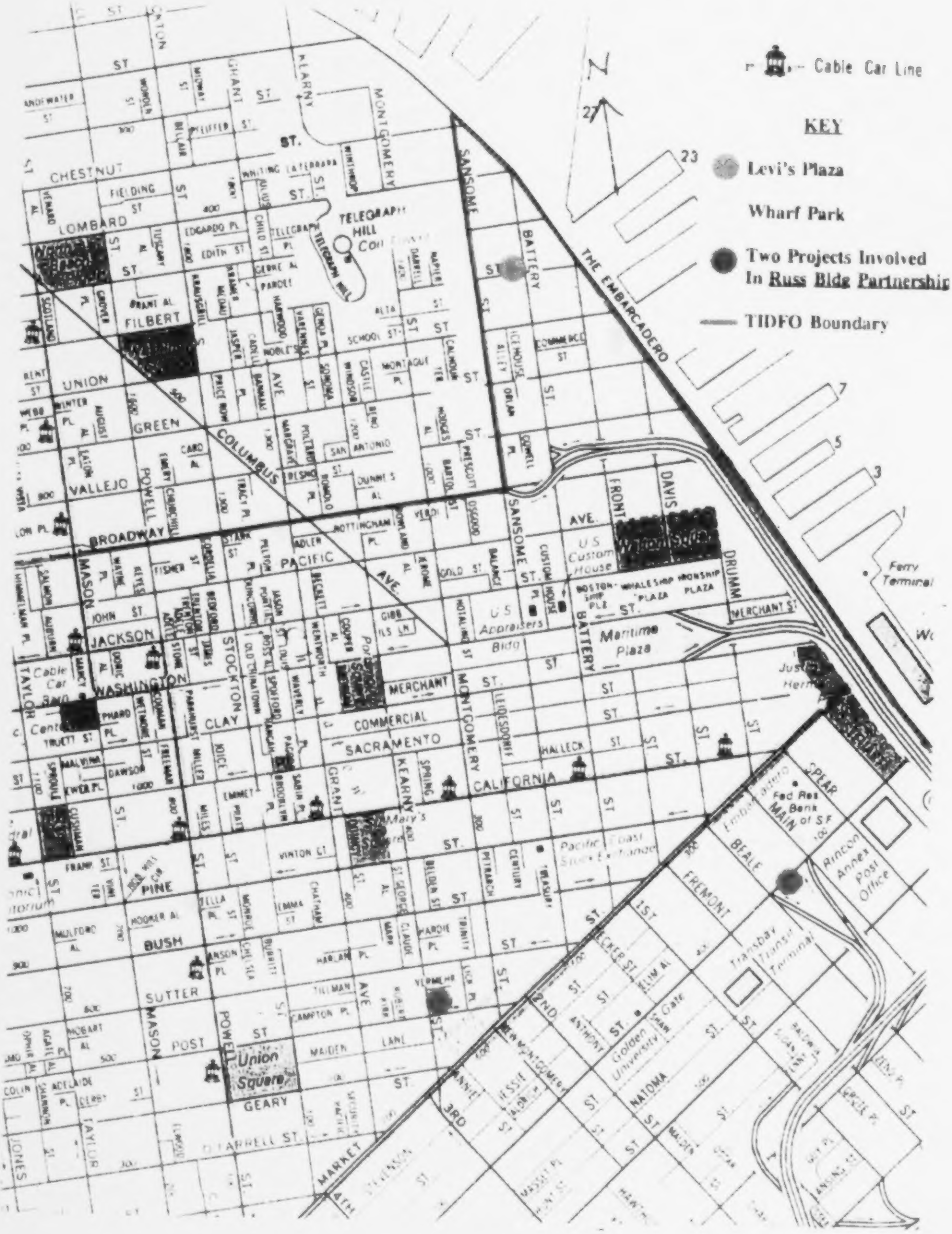
Supreme Court Filed
April 29, 1992
Robert Wandruff Clerk
Deputy

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

Lucas
Chief Justice

APPENDIX C


Cable Car Line
KEY
Levi's Plaza
Wharf Park
Two Projects Involved In Russ Bldg Partnership
TIDFO Boundary
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THE EMBARCADERO
TELEGRAPH HILL
COLUMBUS AVE
BROADWAY
PACIFIC
JACKSON
WASHINGTON
CLAY
SACRAMENTO
CALIFORNIA
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BUSH
SUTTER
POST
GEARY
O'FARRELL ST.
MARKET
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JONES
SANSOME
BATTERY
FRONT
DAVIS
DRUMM
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FILBERT
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Supreme Court, U.S.
FILED
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No. 92-117

In The

Supreme Court of the United States

October Term, 1992

◆

BLUE JEANS EQUITIES WEST,
Petitioner,
v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

◆

Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Three

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, BLUE JEANS EQUITIES WEST

◆

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Supreme Court Rule 37 1

No. 92-117

◆

In The

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October Term, 1992

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BLUE JEANS EQUITIES WEST,

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v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

◆

Petition for Writ of Certiorari
to the California Court of Appeal,
First Appellate District, Division Three

◆

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, BLUE JEANS EQUITIES WEST

◆

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner, Blue Jeans Equities West. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the Clerk of the Court.

◆

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation in this case.

Amicus seeks here to supplement the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases before this Court involving issues arising under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), and this Court's decision in *Nollan* is central to the issues presented here.

By classifying *Nollan* as a physical invasion case, the court below has established a precedent which can only add great confusion to an area of the law already difficult for most practitioners and trial courts.

The public interest in clarifying and resolving the proper scope of *Nollan's* exaction rules is magnified by the fact that local agencies throughout the land, seeking to enhance revenues, are increasing their efforts to justify development fees as a means of financing public programs. If this type of exaction is to be immunized from *Nollan's* constitutional principles, such a conclusion should be reached by this Court and uniformly applied throughout the Nation. The primary concern of this amicus, however, is that the holding below sets a precedent which seriously erodes the constitutional concept of property rights by permitting regulatory agencies to accomplish indirectly, through the means of monetary exactions, regulatory schemes which would fail under *Nollan's* principles.

◆

SUMMARY OF ARGUMENT

As this Court's opinion in *Nollan v. California Coastal Commission* reflects, the concern there was with a "leveraging of the police power" as a means of achieving goals not sufficiently related to burdens or needs caused by a development project requiring a permit. 483 U.S. at 837 n.5. Unfortunately, under the view now adopted in California, this Court's *Nollan* decision can be sidestepped by merely leveraging the police power with demands for money rather than real property. *Nollan's* thrust is blunted and the principles announced in *Nollan* are reduced to little more than a "pleading requirement." "Cleverness and imagination" have proved successful after all.[1]

---

[1] We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 841.

Nollan stands for the proposition that there must be an "essential nexus" between an exaction demanded from an owner seeking a permit and some public burden or need created by the owner's proposed project. Absent this essential nexus, the demand represents nothing more than an outright attempt at extortion. *Nollan,* 483 U.S. at 837. Contrary to the holding of the California court below, such principles are as applicable to demands for money as they are to demands for land. And in both situations, the focus of the constitutional analysis is not so much on that which is being exacted as it is on the undue regulatory restriction placed on the use of land.[2] Although this point seems clearly made in *Nollan* (483 U.S. at 836-37), this Court's reasoning was totally lost on the court below. The court below simply failed to recognize that *any* prohibition on the use of land, imposed unless the owner acquiesces in a condition not adequately related to the owner's project, results in a *regulatory taking* which impacts *the owner's land.*

It is submitted that the views expressed by this Court in *Nollan,* including this Court's view as to the appropriate standard of review (483 U.S. at 835 n.3), would have been no different if the California Coastal Commission had there demanded money rather than an easement. The underlying constitutional principles are the same and it makes a sham of this Court's opinion to suggest that the California Coastal Commission could have succeeded by demanding that the Nollans pay to another agency that amount of money needed to acquire the Nollan's beach by eminent domain. In either case, where there is not a sufficient nexus, the restriction on land use unjustifiably deprives the owners of the use of their real property. And in both cases, absent a sufficient nexus, the restriction fails to substantially advance a legitimate government interest. The result is a taking. *Nollan*, 483 U.S. at 834; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). *See also Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 60 U.S.L.W. 4842, 4845 (June 29, 1992).

---

[2] As *Nollan* emphasized, absent an adequate nexus, the resultant "building restriction is not a valid *regulation of land use* but 'an out-and-out plan of extortion.' " *Nollan,* 483 U.S. at 837 (emphasis added).

◆

ARGUMENT

The California court below has taken a wrong turn down the constitutional pathway and has directed the state's trial courts to apply an artificial distinction which hopelessly confuses the constitutional principles involved. In so doing, the state court has immediately undermined the protections afforded by *Nollan* with respect to regulatory demands of a type which had so relentlessly been pursued in California before *Nollan*. To avoid *Nollan's* impact, and the degree of scrutiny required therein, future governmental demands will merely be couched in terms of: "Give me your land or give me your money."

The confusion and doubt spawned in California, caused by an opinion which seriously conflicts with applicable decisions of this Court on an important principle of constitutional dimension, surely should be reviewed by this Court. In this regard, it must be remembered that the right to make reasonable use of property, free from extortive governmental demands, involves a matter of individual liberty and a basic civil right which should be jealously guarded by the courts.[3]

I

NOLLAN CANNOT BE ISOLATED AS A POSSESSORY TAKING CASE—THIS COURT THERE HAVING PURSUED A REGULATORY TAKINGS ANALYSIS

The court below found that a "threshold issue" to be addressed was whether "the *Nollan* nexus test should be applied to the case at bench." Petition, Appendix A-4. The court then characterized *Nollan* as a physical invasion case as it pursued the distinction this Court has made between possessory and regulatory takings.[4] The court below thereupon held that *Nollan's* requirements are only applicable to possessory takings and hence only to exactions where the demand is for a possessory interest in real property. This is truly a confused reading of *Nollan* and creates a constitutional distinction in California contrary to the direction and reasoning employed by this Court.

---

[3]

> Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation . . . is in truth a "personal" right . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

[4] The court below said:

> However, the high court appears to make a distinction between "regulatory taking," *i.e.*, economic regulation, most forms of zoning, and other restrictions on land use, and "possessory takings," where the government, or an authorized third person, physically intrudes upon or appropriates the property.

Petition, Appendix A-5.

This Court began its analytical discussion in *Nollan* by pointing out that if the Nollans had been "required" to grant an easement across their property, this undoubtedly would have resulted in a taking. *Nollan*, 483 U.S. at 831. When the Court, later in its opinion, reemphasized the point stating that "requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment" (*id.* at 834), the Court only stated a view quite consistent with its more recent holding in *Yee v. City of Escondido*, ___ U.S. ___, 60 U.S.L.W. 4301 (April 1, 1992).[5]

This Court in *Nollan*, however, saw the situation before it quite differently. The Court said that the question presented was "whether requiring [the easement] to be conveyed *as a condition for issuing a land-use permit* alters the outcome." *Nollan*, 483 U.S. at 834 (emphasis added). The Court then immediately launched into a discussion of regulatory takings law which can be traced back through such regulatory takings cases as *Agins v. City of Tiburon*, 447 U.S. 255; *Penn Central Transportation*

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[5] In *Yee*, the Court held that the "government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee*, 60 U.S.L.W. at 4303 (emphasis in original).

Co. v. City of New York, 438 U.S. 104 (1978); and to the case which first announced a regulatory takings doctrine—*Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). The Court in *Nollan* was thus using and applying a regulatory takings analysis when it adopted a higher level standard of review.[6] Indeed, this Court's conclusion that the appropriate standards in takings cases are not the same as those applied in due process or equal protection cases was based on the requirement that a regulation substantially advance legitimate state interests. *Nollan*, 483 U.S. at 834 n.3. This is an integral part of regulatory takings analysis. *See, e.g.*, *Agins*, 447 U.S. at 260, and *Penn Central*, 438 U.S. at 127. Obviously, the higher level standard adopted in *Nollan* cannot be separated from this Court's regulatory takings analysis because the requirement is part and parcel thereof.

In this regard, it is important to note that this Court expressly found that an earlier assumption, contrary to its *Nollan* analysis, contained in *Goldblatt v. Hempstead*, 369 U.S.

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[6] *Yee* also seems to view *Nollan*, and its nexus requirement, as involving regulatory takings principles. The Court said:

> By contrast, petitioners contend that the Escondido ordinance transfers wealth only to the incumbent mobile home owner. This effect might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance. *See Nollan v. California Coastal Comm'n, supra*, at 834-835. But it has nothing to do with whether the ordinance causes a physical taking.

Yee, 60 U.S.L.W. at 4304 (emphasis in original).

590 (1962), was "inconsistent with the formulations of our later cases." *Nollan*, 483 U.S. at 834 n.3. Yet, *Goldblatt* was a regulatory taking case. *Goldblatt* addressed a zoning ordinance regulating dredging and pit excavating within Hempstead's town limits. Obviously, there would have been no occasion to disapprove reasoning in a regulatory taking case if this Court intended its analysis in *Nollan* to be solely applicable to possessory takings cases.

Finally, it would seem that any doubt regarding *Nollan's* analysis is removed given the fact that issues regarding standard of review seem nonexistent in possessory takings cases. Permanent physical encroachment results in a *per se* taking—there is really nothing left to scrutinize. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, this Court found it unnecessary to examine whether the physical occupation there involved would substantially advance legitimate government interests or would result in severe economic impact—principal considerations in regulatory takings cases. The Court said:

> [O]ur cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

Id. at 434-35.

It thus seems that issues concerning standard of review or, for that matter, whether a "nexus" exists, disappear when the case involves a possessory rather than a regulatory taking. And it further seems apparent that the California court below seriously strayed from the intended path when it pigeonholed *Nollan* as a physical invasion case.

Although many California regulatory agencies (including even the California Coastal Commission) continue to attempt to skirt *Nollan's* requirements, the effort generally has been rejected at least in cases demanding a real property exaction. For example, in *Surfside Colony, Ltd. v. California Coastal Commission*, 226 Cal. App. 3d 1260 (1991), a major effort was made to circumvent *Nollan's* principles. The attempt was spurned, the California appellate court there stating:

> *Nollan*, however, changed the standard of constitutional review in takings cases. Whether the new standard be described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test employed [previously in California] no longer controls.

Surfside Colony, 226 Cal. App. 3d at 1270.

Unfortunately, where an exaction calls for money rather than land, the opinion below now reflects a return of the California courts to their erroneous ways prior to *Nollan*. And if government agencies can get around *Nollan* by demanding money rather than real property, then *Nollan* is rendered meaningless. There is no analytical basis for distinguishing between real and personal property—at least not in this context where the constitutional focus is on the regulation of real property.

II

THE HOLDING BELOW RESULTED FROM A CONCEPTUALLY CONTORTED EFFORT TO DISTINGUISH NOLLAN

Isolating *Nollan* as a physical invasion case creates a terrible confusion in the law applicable to takings. In *any* land use permit exaction case, the right which is involved is the right to make reasonable use of one's real property without being subjected to unwarranted restrictions. Even the California courts have recognized that "an *undue* restriction on the use of private property is as much a taking for constitutional purposes as appropriating or destroying it." *Candlestick Properties, Inc. v. San Francisco Bay Conservation and Development Commission,* 11 Cal. App. 3d 557, 572 (1970) (emphasis in original). But the California courts, before *Nollan,* began to uphold severe regulatory demands based on the rationalization that the issuance of a permit results in a "governmental benefit" for which a *quid pro quo* can be demanded. *See, e.g., Grupe v. California Coastal Commission,* 166 Cal. App. 3d 148, 176-77 (1985). However, this Court in *Nollan* solidly rejected the theory stating that "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.' " *Nollan,* 483 U.S. at 833 n.2. Were it otherwise, and as observed in *Nollan* (483 U.S. at 837 n.5), stringent land use regulations could readily be invoked solely for the reason that a waiver thereof could be traded for the concession being demanded. Such considerations are, of course, as applicable to monetary exactions as they are to any other form of exaction.

In short, this Court's concern in *Nollan* did not relate to whether the concession demanded for permit approval would result in physical occupation of the property. The concern in *Nollan* was whether the concession demanded was legitimately related to public needs or burdens created by the proposed development because, if not, it would have to be viewed as imposing an improper restriction on the Nollans' right to make reasonable use of their real property. The distinction attempted below simply does not mesh with the legal principles involved. An inadequately related demand for money is just as wrong as an inadequately related demand for real property.

CONCLUSION

Local regulatory actions, which impose substantial fees on property owners as a condition of improving their properties, cannot be immunized from the judicial scrutiny required by *Nollan*. If the courts look the other way, and avoid the glare of what is really happening, they effectively will have delegated a responsibility to protect individual rights to the regulating agencies themselves—agencies whose primary interest is to fund their projects. In the absence of an adequate nexus, justified under the principles established in *Nollan*, any demand for a tribute, be it land or money, improperly seeks to force some people alone to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. This Court has repeatedly stated that the very purpose of the Takings Clause is to prevent any such result. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960), and *First*

English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-19 (1987).

The petition for writ of certiorari should be granted.

DATED: August, 1992.

Respectfully submitted,

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No. 92-117

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CITY AND COUNTY OF SAN FRANCISCO,
A Municipal Corporation,
Respondent.

◆

Petition For Writ Of Certiorari
To The California Court Of Appeal

◆

BRIEF IN OPPOSITION

◆

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No. 92-117

In The

Supreme Court of the United States

October Term, 1992

BLUE JEANS EQUITIES WEST, A Joint Venture,

Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
A Municipal Corporation,

Respondent.

Petition For Writ Of Certiorari
To The California Court Of Appeal

BRIEF IN OPPOSITION

Respondent City and County of San Francisco (the "City") files this brief in opposition to the Petition for Writ of Certiorari filed by appellant Blue Jeans Equities West ("BJEW") and prays that the Writ be denied. The California Court of Appeal, First Appellate District, Division Three, correctly affirmed the City's right to impose

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NOTE: For consistency, we use the citation format suggested by Appellant. Footnotes are omitted and emphasis is ours unless otherwise stated in all quoted material. With respect to the record before the California Court of Appeal, "RT" refers to the Reporter's Transcript, and "AA" refers to the Appellant's Appendix. We refer to trial exhibits by exhibit number. The trial exhibits are attached to the Appellant's Appendix.

its Transit Impact Development Fee ("TIDF") on BJEW as a condition of developing a large office building complex in San Francisco known as Levi's Plaza.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeal has affirmed the right of the City to collect the TIDF from BJEW. Payment of the TIDF fulfills a transit mitigation condition the City imposed on BJEW when it obtained approval to develop Levi's Plaza. Like the two office projects at issue in *Russ Bldg. Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 854-55, 244 Cal.Rptr. 682, 750 P.2d 324, *appeal dismissed sub nom. Crocker National Bank v. City and County of San Francisco,* 488 U.S. 881 (1988) ("*Russ Bldg. II*"), (1) the Levi's Plaza project had been approved prior to passage of the Ordinance authorizing the TIDF; and (2) the approval was conditioned on the developer's commitment to pay for the increased costs of public transit generated by its project.

BJEW takes issue with the Court of Appeal's determination not to apply the so-called "heightened scrutiny" nexus test of *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), to the TIDF.[1] Despite the fact that the

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[1] Many courts and commentators have disagreed that *Nollan* requires a heightened level of scrutiny. *See, e.g., Commercial Builders of Northern California v. Sacramento,* 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1997 (1992), and cases cited therein ("*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly

Ordinance and its underlying assumptions have been upheld (*Russ Bldg. Partnership v. City and County of San Francisco,* 199 Cal.App.3d 1496, 246 Cal.Rptr. 21 (1987) ("*Russ Bldg. I*"), reprinted as directed by the California Supreme Court in *Russ Bldg. II, supra,* 44 Cal.3d at 854-55), BJEW contends that *Nollan* requires the City to demonstrate a precise connection between the amount of the TIDF and the *individual* transit burden caused by Levi's Plaza.

The Court of Appeal correctly interpreted *Nollan* to apply to cases involving "possessory takings." The decision is consistent with this Court's unanimous holding in *United States v. Sperry Corp.,* 493 U.S. 52, 60, 62 n.9 (1989), that a statutory user fee was not a "physical appropriation of property" and need only approximate the cost of benefits supplied to withstand a takings challenge. The Court of Appeal also correctly relied on the Ninth Circuit's decision in *Commercial Builders of Northern California v. City of Sacramento,* 941 F.2d 872 (9th Cir. 1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1997 (1992), which upheld an ordinance imposing a low-income housing fee on new non-commercial development.

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responsible for the social ill in question."). Based on decisions applying *Nollan,* commentators have identified three possible meanings of the *Nollan* nexus test: *Nollan* as a heightened scrutiny test, as a narrow holding, and as a balancing test. *See* Lemon, Feinland, Deihl, *The First Applications of the Nollan Nexus Test: Observations and Comments,* 13 Harv. Envtl. L. Rev. 585, 589-95 (1989).

More fundamentally, *Nollan* does not require that the City demonstrate that the TIDF be tailored with "mathematical nicety" to each individual project subject to the Ordinance. The Constitution does not require developer's exactions and other police power regulatory fees imposed by legislation to be tailored to each entity subject to the fee. However, the evidence in the record of the significant impact Levi's Plaza posed to public transit (as described in its Environmental Impact Report) would pass muster under established economic regulatory takings analysis. *See, e.g,* Exh. 1, AA, pp. 148-49.[2]

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STATEMENT OF THE CASE

The City submits this Statement of the Case to provide the Court with a more complete background of the TIDF Ordinance and related litigation, and to correct various misstatements in Petitioner's Statement.

A. The TIDF Ordinance

The TIDF Ordinance was a legislative solution to a problem that had been escalating for years prior to passage of the Ordinance. Office construction in the downtown area of San Francisco had proliferated, placing increasing demands on an already overburdened public transit system. Faced with the need to expand transit capacity to provide service to and from the area for the additional employees generated by development of new office buildings, the City enacted the TIDF Ordinance in May 1981 (S.F. Admin. Code §§ 38.1 *et seq.*; Exh. 5, 6).

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[2] In this regard, the City takes issue with the third question presented for review. The question assumes that the TIDF does not alleviate impacts on public transit posed by Levi's Plaza at the time it was approved. As will be explained in the Statement of the Case, *infra,* findings by the trial court, based on substantial evidence at trial, contradict such an assumption.

The TIDF Ordinance entitles the City to recover from the developers of new office space in the "downtown area" of San Francisco a portion of the City's incremental cost of expanding and operating public transit to meet the demand created by the new office development. Exh. 5, §§ 38.2, 38.3.[3] The Ordinance limits the developer's monetary contribution to $5.00 per square foot of new office space. Exh. 5, § 38.6.[4] The TIDF Ordinance states its purpose in relevant part as follows:

> It is the purpose of this ordinance to require developers of new development in the downtown area to pay a fee *which is related directly to the incremental financial burden imposed on the Municipal Railway*. . . .
>
> . . . This fee is intended to recover all costs incurred by the Municipal Railway in meeting peak-period public transit service demands created by office uses in each new development

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[3] The parties stipulated that the "downtown area," as defined in Section 38.1(d) of the Ordinance, includes the area of San Francisco where Levi's Plaza is located. AA 28: 7-8. *See also* map of TIDF area. Exh. 23 (Appendix A hereto).

[4] As the court noted in *Russ Bldg. I, supra,* 199 Cal.App.3d at 1503 n.2, the actual adjusted estimates of increased transit costs attributable to new riders ranged from $6.57 to $8.36 per square foot (the trial court in that case relied on the latter figure).

> subject to the fee, including the expansion of service capacity through the purchase of rolling stock, the installation of new lines, the addition to existing lines and the long term operation, maintenance, repair and replacement of those expanded facilities.

Exh. 5, § 38.3.[5]

In *Russ Bldg. I, supra,* the California Court of Appeal upheld the constitutionality of the TIDF Ordinance. The Court rejected claims that the TIDF was a "special tax" under Article XIII A, section 4 of the California Constitution, and that it violated federal and state equal protection and substantive due process guarantees.

The City's transit planners had grappled with the problem of increasing demand on existing public transit facilities long before settling on the TIDF as the proper funding mechanism to alleviate the problem. The City determined that until such a funding mechanism was adopted, developers should be put on notice that they might be required to contribute to the expansion of transit service to accommodate the increased ridership that their developments would generate. In anticipation of the City's enacting some form of transit funding mechanism, the City's Planning Commission approved certain building permits on the condition that the developer agree to participate in a funding mechanism if enacted. Exh. 2, 7-20. Levi's Plaza was the first of such developments. *Id*.

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[5] BJEW makes references in its factual statement to the City's "transit first" policy. Pet. at 7. The TIDF Ordinance, however, makes no mention of the "transit first" policy in its findings (Exh. 5, § 38.2), or in any other section of the Ordinance. Furthermore, the Transportation Element of the City Master Plan (cited in Pet. at n.15) is not part of the record in this case. Such discussion is therefore gratuitous and should be disregarded.

The California Supreme Court declined to review the portion of the Court of Appeal decision in *Russ Bldg. I* upholding the TIDF Ordinance on its face. Instead, in *Russ Bldg. II*, the Court addressed the applicability of the Ordinance to two other office projects that had been approved prior to and were under construction at the time the Ordinance was enacted. The Planning Commission resolutions approving those projects contained transit mitigation conditions that the Court found comparable to the transit mitigation condition contained in the resolution approving Levi's Plaza. 44 Cal.3d at 844, n.2.[6] The Court upheld the application of the Ordinance to the two projects, determining that the transit mitigation conditions sufficiently put the developers on notice of their obligation to contribute to public transit by such a mechanism as the TIDF. *Id*. at 846-53. The Court concluded that imposition of the TIDF did not impair the developers' vested rights. *Id*. at 853-54.[7]

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[6] BJEW's statement that the language in the respective conditions "differs substantially" (Pet. at 8, n.18) contravenes the *Russ Bldg. II* finding. Indeed, the Court of Appeal below commented that "our Supreme Court found the [respective] conditions ***substantially similar***." Pet. at A-8.

[7] Plaintiffs in *Russ Bldg. II* also asked the Court to consider the applicability of this Court's decision in *Nollan, supra*, to the TIDF. The California Supreme Court declined to do so. 44 Cal.3d at 845, n.6.

B. Levi's Plaza

The facts in this case parallel the facts in *Russ Bldg. II.* In both cases, the respective projects were approved substantially before passage of the TIDF Ordinance. Likewise, at the time the projects were approved, the City did not know what type of funding mechanism, if any, would be imposed to deal with the burden on the City's public transit system resulting from the new office construction. *See* Green testimony excerpted at 44 Cal.3d at 851-52. It was certain, however, that (1) mushrooming office construction would significantly increase the need for enhanced public transit; (2) the transit system could not accommodate the new patrons the office buildings would generate; and (3) the City did not have the funds to pay for the necessary expansion and operation of increased capacity to accommodate the new riders. Levi's Plaza is only unique in that it was the first of the pre-TIDF Ordinance projects upon which a transit mitigation condition was imposed.

BJEW premises its petition on the erroneous notion that the City did not adequately define the problem associated with the impact of Levi's Plaza on public transit.[8] On the contrary, as noted by the Court of Appeal, the Levi's Plaza Environmental Impact Report ("EIR"), certified on December 14, 1978, specifically described the burden on public transit posed by the development. Pet. at A-2 & n.1. The EIR also suggested mitigation measures to alleviate such impacts and emphasized that lack of funds prevented implementation of the mitigation measures. Exh. 1, AA, pp. 148-49.

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[8] For example, BJEW mischaracterizes the City's recognition of the impact of new development on transit service as only a "possible" linkage. Pet. at 5. BJEW also erroneously claims that the EIR showed merely that Levi's Plaza *might* impose a burden on public transit. Pet. at 6.

Levi Strauss & Co. was to be BJEW's primary tenant in the new complex. The EIR pointed out that Levi's employees arriving on other transportation lines would have to transfer to City buses to get to Levi's Plaza. The EIR concluded that the City would have to operate *16 additional bus runs* during peak periods to serve this increased demand. Exh. 1, AA, p. 148. In order to mitigate this impact, the EIR suggested that the headways (*i.e.*, the time between buses) on the affected routes would have to be reduced to about 3 to 5 minutes during peak hours. The EIR noted that *"[n]o funds are available* for equipment and staff necessary for implementation of such mitigation measures. AA, pp. 148-49. Thus, the EIR precisely identified the problem: *paying to provide capacity to accommodate the increased transit service demand caused by the development. See also* RT 129:28-130:12.[9]

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[9] The record below also demonstrates that BJEW was both aware of the problem and committed to solving it. At the Planning Commission hearing on January 4, 1979, BJEW partner Gerson Bakar assured the Commission that "[i]f an equitable device is brought forth, and we understand that device is not available today, we as developers and along with our neighbors that would partake in that . . . would become a party to it." Exh. 25, AA 258:17-22. Mr. Bakar's testimony responded to concerns from neighbors that there should be a commitment from the developer to fund the increased transit necessary to serve the project. Exh. 25, AA 254-55.

The Planning Commission approved the project on January 4, 1979, pursuant to Resolution No. 8142. AA 26:25-27:10; Exh. 2. The resolution contained the following transit mitigation condition that responded to the adverse environmental impacts on transportation described in the EIR, as well as to the public testimony at the hearing ("Condition 5(c)"):

> The owner of the project shall make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located.

In further recognition of the potential long-range impact of new commercial development in the downtown area on public transit, and in anticipation of the TIDF Ordinance, which was then pending before the San Francisco Board of Supervisors, the City Planning Commission passed Resolution No. 8543 on March 27, 1980 (Exh. 4). That resolution endorsed the concept of a transit fee "on new non-residential commercial structures in the downtown area to help defray the additional costs of public transit resulting from the occupancy of the new structures." The resolution referred to six recent EIR's which included transit mitigation measures. The resolution also referred to seven recent developments approved by the Commission in which the developer agreed to participate in a "fair and appropriate mechanism to provide funds for maintaining and augmenting mass transit services, should such a mechanism be established by the

City." Levi's Plaza was the first of these developments. Exh. 22.[10]

On May 5, 1981, the City adopted the TIDF Ordinance. BJEW did not receive its Certificate of Final Completion and Occupancy on the project until 1987. AA 27:25-28:3, 28:16-20. The completed project includes 620,481.95 square feet of additional office use in five buildings in the complex. AA 28:11-15. After filing this action, BJEW paid its TIDF in the amount of $3,102,409.75. The City has placed the money in trust pending the outcome of the case. AA 28:16-20.

In its Statement of Decision, the trial court disputed the applicability of *Nollan* to the case at bar (AA 122:11-24) because the exaction is a payment of money, not a physical occupation of real property. Nevertheless, the court found a sufficient nexus under *Nollan* between imposition of the TIDF on Levi's Plaza and the City's objective of mitigating the transit impact generated by the project. AA 122:25-26, 123:1-3. The trial court also found that the language of Condition 5(c) contemplated an obligation on the part of the developer to fund public transit through a mechanism such as the TIDF. AA 119:24-25, 120:1-2.

The Court of Appeal affirmed the trial court's decision. The Court concluded that any heightened scrutiny test in *Nollan* is applicable only to possessory takings cases. Pet. at A-4 – A-7. The Court also agreed with the trial court that Condition 5(c) contemplated payment of the TIDF and imposed a mandatory requirement on BJEW. *Id.* at A-7. The Court further found that BJEW's commitment to fund increased transit "to the area of the city in which the project is located" conformed with the express purposes of the TIDF Ordinance and thus was substantially similar to the *Russ Bldg. II* conditions. *Id.* at A-7 – A-9.[11] The Court concluded that BJEW "had notice

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[10] The California Supreme Court discussed Resolution No. 8543 at some length in *Russ Bldg. II*. 44 Cal.3d at 852-53. The Court found the resolution supportive of its conclusion that "the TIDF is within the range of mechanisms contemplated by the transit mitigation conditions." *Id*. at 853.

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[11] BJEW has argued throughout this litigation that the transit problem posed by Levi's Plaza derived from its location outside the heart of the financial core, rather than from the construction of new office space. *See* Pet. at 20. The evidence in this case, however, is to the contrary. The City's *method* of addressing the transit impacts generated by Levi's Plaza may have been affected by the location of the development, but the *overall transit problem* posed by Levi's or by new office development in the financial district of the City *was the same*: there were no funds to pay for the increased demand on public transit generated by the new developments. RT 129:28-130:12. For example, former Planning Director Rai Okamoto testified as follows:

> [I]t had become apparent I think at the time that there would be expected a *change in the character of land use* in [the Northern Waterfront area] *which might increase the need for improved transit, in this case office development*, which is generally more as they say labor intensive than some [of] the previous uses had been. So there was concern about how people would move in and out of that area by transit.

RT 101:28-102:6.

It is manifest that increased demands on an overburdened system pose the same problem even if the site of a particular demand has not been developed as intensely as another site. Thus, the "downtown area" as defined in Section 38.1(d) of the Ordinance includes not only the City's financial district, but a much broader area of the City that the legislators anticipated that its development would adversely impact on public transportation and agreed to participate in funding mechanisms to assure adequate transit service to its project." *Id.* at A-9.

The California Supreme Court denied BJEW's Petition for Review on April 29, 1992. This Petition followed.

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REASONS THE PETITION SHOULD BE DENIED

I. THIS CASE PRESENTS NO ISSUES MERITING SUPREME COURT REVIEW; THE COURT OF APPEAL'S INTERPRETATION OF *NOLLAN* IS CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

A. *Nollan* Is Not A "Regulatory Takings" Case

BJEW insists that *Nollan* is a "regulatory takings" case, but the *Nollan* opinion does not support that assertion. *Nollan* involved the development of beachfront property. As a condition of their construction permit, the California Coastal Commission had required the Nollans to *dedicate a lateral easement* so that the public could gain access to public beaches near the Nollan's property.

Thus, *Nollan* is clearly a "possessory takings" case. Although the government in Nollan was not taking property outright, it was effectively taking the property through the permit condition. The Court likened *Nollan* to the *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), line of cases, explaining as follows:

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would continue to be developed with office space in the future. *See* Exh. 23 (Appendix A hereto).

> We think a "*permanent physical occupation* has occurred [for purposes of the *Loretto* rule] where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.
>
> * * *
>
> Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether *requiring it to be conveyed as a condition for issuing a land-use permit* alters the outcome.

483 U.S. at 832, 834.

This Court held that such a permit condition would be constitutional only if it substantially advances a legitimate governmental interest and does not deny the landowner economically viable use of his land. *Id.*, citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980). This Court found *no nexus* between the permit condition and the justification for the burden on the property owner; thus, the court found an unconstitutional taking without having to discuss whether the condition denied the Nollans economically viable use of their property. 483 U.S. at 838-39.

The majority in *Nollan* cautioned that the "substantial" criterion was most relevant to cases in which the government was attempting to appropriate physical access:

> We are inclined to be particularly careful about the adjective *where the actual conveyance of property* is made a condition to the lifting of a land-use restriction since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

483 U.S. at 841.

In *Yee v. City of Escondido,* 60 U.S.L.W. 4301, 4302 (U.S. April 1, 1992), this Court explained that in "possessory takings" cases, such as *Loretto, supra,* "the government *authorizes a physical occupation of property* (or actually takes title) . . . . " Under such cases, the Takings Clause usually requires compensation.

Shortly thereafter, in *Lucas v. South Carolina Coastal Council,* 60 U.S.L.W. 4842 (U.S. June 29, 1992), this Court refined the "possessory takings" analysis, in which compensation is available "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.* at 4845. In addition to the compelled physical invasion, this Court found "categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land." This Court reasoned that such regulations "carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.* at 4846. The Court cited *Nollan* as representative of this class of cases. *Id.* at 4845.

On the other hand, in "regulatory takings" cases, "the government merely regulates the *use* of property." *Yee, supra,* 60 U.S.L.W. at 4302. In *Yee,* involving a local rent control ordinance affecting mobile home park owners, this Court found no compelled physical invasion of land. The mobile home park owners voluntarily rented their land to the mobile home owners and were not compelled to continue to do so. *Id.* at 4303.[12] *See also Pennell v. City of San Jose,* 485 U.S. 1 (1988) (local rent control ordinance allowing consideration of hardship to a tenant when determining whether to approve rent increases); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986) (requirement that employers withdrawing from pension plan pay additional amount corresponding to employers' proportionate share of plan's unfunded vested benefits); *Penn Central Transportation Co. v. New York City,* 483 U.S. 104 (1978) (landmarks preservation law regulating use of airspace over Grand Central Station). In such "regulatory takings" cases, courts conduct "ad hoc factual inquiries into the circumstances of each particular case" to determine whether a taking has occurred. *Connolly, supra,* 475 U.S. at 224.

B. *Nollan* Does Not Apply To Fee Exactions

In *Commercial Builders, supra,* the Ninth Circuit recognized that *Nollan* was a species of "possessory takings" cases. *Commercial Builders* upheld the constitutionality of a Sacramento, California ordinance that conditioned certain types of nonresidential building permits upon payment of a fee. The fee was designed to offset the burdens on the supply of housing stock caused by low-income workers who moved to the city to fill jobs created by the projects.[13] Plaintiffs argued that a *Nollan* "heightened scrutiny" test applied to any condition on development, but did not convince the court:

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[12] BJEW would label *Nollan* a regulatory takings case, claiming that the Nollans could have chosen not to take advantage of the benefits of their permit, obviating the compelled exaction of the easement. Pet. at 10-11. However, such an argument could apply to any exaction. The essence of the *Yee* distinction is between a compelled *physical occupation* of property and regulation of the *use* of the property. In the instant case, the exaction of the TIDF involves no physical invasion of land at all.

> [W]e are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance. The *Nollan* Court specifically stated that it did not have to decide "how close a 'fit' between the condition and the burden is required," because it found that the regulation in question "d[id] not meet even the most untailored standards." 483 U.S. at 838, 107 S.Ct. at 3149. . . . Other circuits have considered the constitutionality of ordinances that placed burdens on land use after *Nollan*. *None have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land.* [Citations.]

941 F.2d at 874.

Plaintiffs in *Commercial Builders* also argued that the fee resembled a physical appropriation of property and was thus a taking *per se*. The court, however, reasoned that a "purely financial exaction . . . will not constitute a taking if it is made for the purpose of paying a social cost

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[13] The fees imposed on developers are paid into a fund to assist in the financing of low-income housing. *Id.* at 873.

that is reasonably related to the activity against which the fee is assessed." 941 F.2d at 876.[14]

In concluding that the nexus between a fee and the activity the fee underwrites may be a relatively loose one, the *Commercial Builders* court relied on this Court's decision in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), reversing the only federal circuit court which had struck down a user fee as an unconstitutional taking.

Sperry upheld the exaction of a percentage of any award made by the Iran-United States Claims Tribunal to cover the costs incurred by the Tribunal. This Court unanimously rejected Sperry's contention that the monetary deduction for use of the Iran Tribunal was "akin to a 'permanent occupation' of its property and thus [was] a per se taking":

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[14] By analogy, there would be no *federal* constitutional prohibition on the City *taxing* developers of new office space to raise revenue to pay for transit, and the tax need not be related to the problem its proceeds would address. *See, e.g., Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974), in which a unanimous Court upheld a 20 percent gross receipts tax imposed on parking lot operators to raise revenue because of traffic-related problems caused by the operations. The Court "refused either to undertake the task of passing on the 'reasonableness' of a tax that otherwise is within the power of . . . state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable." *Id.* at 373. Instead, the Court recognized that the amount of the tax is a legislative prerogative and will only be struck down if it is so arbitrary as to become confiscatory. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 627 & n.17 (1981). Because of Article XIII A of the California Constitution that limits special purpose taxes, the TIDF was carefully written to pass muster as a fee. However, for this Court's purposes, it makes little sense to scrutinize a fee that would not be subject to review were it a tax.

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. *Unlike real or personal property, money is fungible.* No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case was a physical occupation requiring just compensation, so would be any fee for services . . . .

493 U.S. at 62 n.9

Other courts have declined to apply the *Nollan* test in economic regulatory settings. For example, relying on *Sperry*, the court in *Atlas Corp. v. United States*, 895 F.2d 745, 756-58 (Fed.Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990), rejected the claim of a producer of uranium and thorium that federally mandated cleanup costs upon termination of its license effected a taking. The court ruled in this way despite the company's allegations that the amount of money it would be required to spend was greater than the value of the mill.[15]

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[15] *See also Colorado Springs Production Credit Ass'n v. Farm Credit Admin.*, 1992 WL 142068 (D.C. Cir. June 26, 1992) (federal statutory requirement that production credit associations make one-time purchase of stock from Farm Credit System Financial Assistance Corp. to avert financial crisis in Farm Credit System not a taking); *Meier v. Anderson*, 692 F.Supp. 546, 554 (E.D. Pa. 1988) (surcharge on health care providers to finance fund to compensate malpractice victims not a taking); *Chang v. United States*, 859 F.2d 893 (Fed. Cir. 1988) (sanctions against Libya resulting in termination of petroleum engineers' employment contracts with Libyan oil companies not a taking).

Legal scholars also agree that the *Nollan* analysis should be limited to possessory takings cases. Pet. at A-5. For example, one commentator concludes that *Nollan* is inapplicable to fee exactions such as the TIDF:

> The Court's concern with "extortion" and lengthy citation of state court development exaction cases raise the question whether, in another instance, the Court would strike down, for example, a *linkage or impact fee requirement imposed on commercial developers*. However, the *Nollan* opinion, with its solicitude for the right to build a private residence on private property, *would not support such a holding*. On the contrary, the majority suggests in closing that a *Nollan nexus requirement would be limited to permits conditioned on transfer of an interest in real property* . . . .

Lawrence, *Means, Motives and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 Harv. Envtl. L.Rev. 231, 261, 262-63 (1988). Other commentators concur:

> [W]here the development condition poses no threat to *title* or *physical occupation* – such as payment of an impact fee or monetary exaction – there is no rationale for the reviewing court to resort to heightened scrutiny in a taking claim and the test for remoteness reduces to a substantive due process inquiry of rational basis analysis.

Freilich & Chinn, *Finetuning the Taking Equation: Applying it to Development Exactions, Part I*, 40 Land Use Law & Zoning 3, 8 (Feb. 1988) (emphasis in original).

BJEW asks this Court to decide an issue that does not merit its review. Case law and commentary uniformly support the decision of the Court of Appeal that *Nollan* does not govern this case.[16] The Petition should be denied.

II. ONCE A DEVELOPMENT FEE ORDINANCE OF GENERAL APPLICATION HAS BEEN UPHELD TO A CATEGORY OF DEVELOPMENTS, NEITHER *NOLLAN* NOR ANY OTHER DECISION OF THIS COURT REQUIRES A MUNICIPALITY THEREAFTER TO DEMONSTRATE THAT THE AMOUNT OF THE FEE IMPOSED BY THE ORDINANCE IS TAILORED TO EACH DEVELOPMENT SUBJECT TO THE ORDINANCE

Despite the fact that the constitutionality of the TIDF Ordinance has been upheld (*Russ Bldg. I*), BJEW insists that the City, years after the project has been approved and constructed, must newly demonstrate that the TIDF is tailored to the transit problems caused by Levi's Plaza.[17] If BJEW prevails, each development subject to the

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[16] A close examination of *Russ Bldg. I*, however, reveals that the TIDF Ordinance would withstand a *Nollan* "heightened scrutiny" test. The *Russ Bldg. I* court found that the TIDF Ordinance was not a "special tax" under Article XIII A, section 4, of the California Constitution. A "special tax" is defined as a fee or exaction that exceeds "the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." Cal. Gov't Code § 50076. Thus, as a matter of law, a precise nexus has been established between the amount of the TIDF and the impact on public transit of office construction in the downtown area of San Francisco.

[17] BJEW claims that the TIDF Ordinance has been invalidly *applied* to its development project (*see* A.A. 4:2-7). Although BJEW consistently has characterized this case as an "as applied" takings case, BJEW has not claimed that the City is applying the TIDF Ordinance incorrectly or in a different manner than as

Ordinance would require judicial reexamination of the reasonableness of the TIDF, even though a court has approved general assumptions underlying the Ordinance and has found a direct relationship between the fee and other properties in the class of developments included within the scope of the Ordinance.

Nollan concerned an action by the California Coastal Commission approving a development permit for a particular project. Municipal ordinances, on the other hand, by their very nature operate generally and have an obligatory force on the community. *See* 5 McQuillin, *Municipal Corporations* § 15.11 (3d ed. 1989). It is fundamental that under its police power, the City has the authority to adopt regulatory ordinances providing they have "a real and substantial relation" to the public welfare interests they are enacted to protect. *See Mugler v. Kansas*, 123 U.S. 623, 661 (1887). The *Russ Bldg. I* court acknowledged that a development fee exaction "is one of the most common subjects of local police power regulation." 199 Cal.App.3d at 1504. However, once a court has determined that such an ordinance advances a legitimate state interest, there may not be further attack on the application of the ordinance to every property subject to the ordinance.

In *Associated Home Builders Etc. v. City of Walnut Creek*, 4 Cal.3d 633, 637-40, 94 Cal.Rptr. 630, 484 P.2d 606 (1971), the California Supreme Court affirmed this principle. The case involved a requirement that developers, as a condition of subdivision development, make a dedication of land for park or recreational purposes or pay an in-lieu

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applied against other property owners. Rather, BJEW contends that the TIDF should not be imposed at all unless the City can show that the fee is tailored to Levi's Plaza.

fee. The plaintiffs argued that there must be a nexus shown between the need generated by the individual development and the dedication requirement in order for a particular dedication to withstand constitutional scrutiny. The Court disagreed:

> We see no persuasive reasons in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

Id. at 639-40.[18]

The notion that a new nexus analysis is unnecessary once the validity of the underlying ordinance has been established is consistent with the decision in *U.S. v. Sperry Corp., supra*. Sperry argued that the charge for use of the Claims Tribunal could not be upheld as a valid user fee because there was no showing that the amount of the deduction approximated the cost of the Tribunal or bore any relationship to the value of the Tribunal's services to Sperry. Giving deference to the legislative findings that the purpose of the fee was to reimburse the United States for costs associated with the Tribunal, the Court held that the *burden was on Sperry to prove the lack of a nexus*. 493 U.S. at 60.

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[18] For a post-*Nollan* treatment of this same issue in another jurisdiction with the same result, *see Weingarten v. Town of Lewisboro*, 144 Misc.2d 849, 857-58, 542 N.Y.S.2d 1012 (1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 563 N.Y.S.2d 60, 564 N.E.2d 670 (1990), *order modified*, 77 N.Y.2d 926, 569 N.Y.S.2d 599 (1991).

In *Russ Bldg. I*, the court found that the TIDF "is directly tied to the increase in ridership that this construction will possibly generate" and "limited to the estimated costs involved to serve the increased ridership." 199 Cal.App.3d at 1505. The court also held that there was substantial evidence to support the methodology used in determining the amount of the fee; in fact, the court pointed out that the actual costs imposed by the new developments would be "well above the $5-per-square-foot fee." *Id*. at 1511-16. To take BJEW's argument to its logical extreme would mean that the City would have to tailor the fee to each project before imposing the TIDF. That would effectively nullify the general force of the Ordinance, as well as the *stare decisis* effect of the *Russ Bldg. I* decision on the class of developments subject to the Ordinance.

Given the facial validity of the TIDF Ordinance, the only inquiry deemed relevant by the *Russ Bldg. II* court was whether the transit mitigation conditions contained in the pre-TIDF approval resolutions encompassed imposition of the TIDF. 44 Cal.3d at 845. In this case, that issue has been decided in the City's favor. *See* Pet. at A-7 – A-9.[19]

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[19] BJEW continues to take issue with the Court of Appeal's interpretation of Condition 5(c). Pet. at 20-22. However, under California law, the question whether Condition 5(c) contemplated the payment of the TIDF is a legal issue involving conflicting extrinsic evidence; thus, any reasonable construction by the lower court must be upheld. 9 Witkin, *California Procedure,*

BJEW did not convince the trial court or the Court of Appeal that the problems posed by Levi's Plaza on public transit differed in any material respect from the plaintiffs in *Russ Bldg. II*. Nor did BJEW prove that the TIDF as applied to Levi's Plaza was in any way arbitrary or unreasonable. The Court of Appeal correctly affirmed the decision of the trial court.

III. EVEN IF IT WERE NECESSARY TO UNDERTAKE A NEXUS ANALYSIS, *CONNOLLY* AND *SPERRY/COMMERCIAL BUILDERS* PROVIDE THE PROPER GUIDANCE

In *Keystone Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 494-95 (1987), this Court reaffirmed its holding in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), that in analyzing whether a taking has occurred because of the impact of government action on a specific piece of property, courts should apply the three-part analysis discussed in *Connolly v. Pension Benefit Guaranty Corp., supra*.[20]

"Appeal" §§ 292, 293 (3d ed. 1985). Further, the question whether the transit problems caused by Levi's Plaza were substantially similar to those motivating passage of the TIDF Ordinance involved consideration of conflicting evidence by the trial court and was therefore governed on review by the substantial evidence test. *Id.* § 278, p. 289. In any event, none of these issues present a federal question meriting this Court's review. *See* Sup. Ct. R. 10.1.

[20] The court contrasted this test with the test to be applied in a purely facial challenge to a statute: "A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land." 480 U.S. at 495; *see also Lucas v. South Carolina Coastal Council, supra*, 60 U.S.L.W. at 4845.

In *Connolly*, this Court identified three factors to be considered in determining whether a regulatory taking has occurred: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. 475 U.S. at 224-25.

Applied here, this analysis demonstrates the correctness of the result in this case. BJEW has never claimed that imposition of the TIDF caused any undue economic impact on the joint venture or interfered with its investment-backed expectations *See, e.g.*, Complaint, AA pp. 1-5. Further, BJEW neither alleged nor submitted evidence that it has been denied any economically viable use of its land. AA 123:13-15.

As to the character of the government action, the initial inquiry is whether there has been an appropriation of assets for the government's own use. 475 U.S. at 225. The *Connolly* Court declared that when funds are used to support a "public program that adjusts the benefits and burdens of economic life to promote the common good," there is no taking. *Id.* Here, the City imposed the TIDF to remedy the burden on public transit caused by BJEW's project, not to enlarge the City's coffers or finance unrelated public projects. *See* AA 119:24-121:6, 122:25-123:3. Further, BJEW is not being singled out to bear the burden of a broader problem not of its own making. *See Armstrong v. U.S.*, 364 U.S. 40, 49 (1960); *Nollan, supra*, 483 U.S. at 835 n.4. Indeed, the *Nollan* Court agreed that the Coastal Commission could have denied the Nollans the right to build their permit outright "if their new house (alone, *or by reason of the cumulative impact produced in* *conjunction with other construction)"* would impede the governmental purposes. *Id.* at 835.

BJEW's claims that the fee should *exclusively* address the transit problems caused by Levi's Plaza. Pet. at 22. However, such a "precise fit" is not required under the law. As the Ninth Circuit emphasized in *Commercial Builders, supra,* 941 F.2d at 875, "*Nollan* does *not* stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is *directly responsible* for the social ill in question." Rather, the financial exaction will be upheld "if it is made for the purpose of paying a social cost *that is reasonably related* to the activity against which the fee is assessed." 941 F.2d at 876.

This analysis is consistent with *Sperry,* which holds that the amount of the fee need not "be *precisely calibrated* to the use that a party makes of government services." On the contrary, the fee need only be " 'a *fair approximation* of the cost of benefits supplied.' " *Id.*, quoting *Massachusetts v. United States,* 435 U.S. 444, 463 n.19 (1978). Indeed, the Court suggested that Sperry might be required to pay a charge for mere availability of the service even if it had not actually used the service. 493 U.S. at 63.

The trial court in this case found the City's transit system to be integrated, so that the incremental demand imposed on the system attributable to the project could not be confined to the particular section of the City where the project was located:

> The City and County's transit system is integrated. Therefore, the impacts of increased

> demand are not limited to the points of initiation or destination. No evidence supports the claim that the Planning Commission condition contemplated that the City and County would create new bus routes confined to the northern waterfront area to respond to increased demand in that area; rather, the EIR proposed that headways be reduced on existing routes during peak hours (15/42 and 32 lines, which pass through the financial district and other parts of the City). Thus, in order to "assure adequate transit service to" Levi's Plaza, BJEW was on notice that (1) [the City] would have to add more buses to reduce headways on existing transit lines into the area and (2) that doing so would directly benefit other areas of the City that those lines serviced.

AA 120:19-121:6.

In such an integrated public transit system, it is obviously infeasible to restrict the transit benefits afforded by the TIDF to Levi's Plaza, as BJEW appears to suggest. Through use of the fee to mitigate the problems addressed in the EIR (*i.e.*, reduction of headways on the 15, 42 and 32 lines during peak-period hours), employees of Levi's Plaza *directly benefit*, as do workers in other office buildings serviced by those lines. BJEW's contention that the fee only "indirectly" benefits Levi's Plaza does not square with the dynamics of a public transit system and is not supported by the record in this case.

At the time Levi's Plaza was approved, BJEW committed to paying for the impact on public transit it acknowledged its development would engender – even though no one, including BJEW, knew what form the funding mechanism would take. Now, having built, operated, and profited from a popular office complex for many years – a complex that the City's transit system has continued to serve – BJEW balks at the payment of the TIDF, claiming the City should have specified the funding mechanism at the time the project was approved. Fundamental fairness and justice impose responsibility for impacts generated by a particular project on the developer of that project. *Connolly, supra,* 475 U.S. at 227. In direct contravention of this fundamental principle of takings analysis, BJEW asks that the public shoulder the financial burden imposed by Levi's Plaza on public transit.

Under a *Connolly* analysis, and under the principles set forth in *Sperry* and *Commercial Builders,* the Court of Appeal correctly upheld application of the TIDF to BJEW. BJEW's position has no basis in law or in fact, and its Petition should be denied.

◆

CONCLUSION

No solid ground exists for review of this case by this Court. Any "heightened scrutiny" test in *Nollan* simply has no application to economic regulatory cases, especially those involving fees. Nor does the law require a legislatively approved fee exaction on developers to be tailored to each project. However, even if a further nexus analysis is required, the TIDF solidly withstands any such scrutiny as applied to BJEW.

Dated: August 13, 1992

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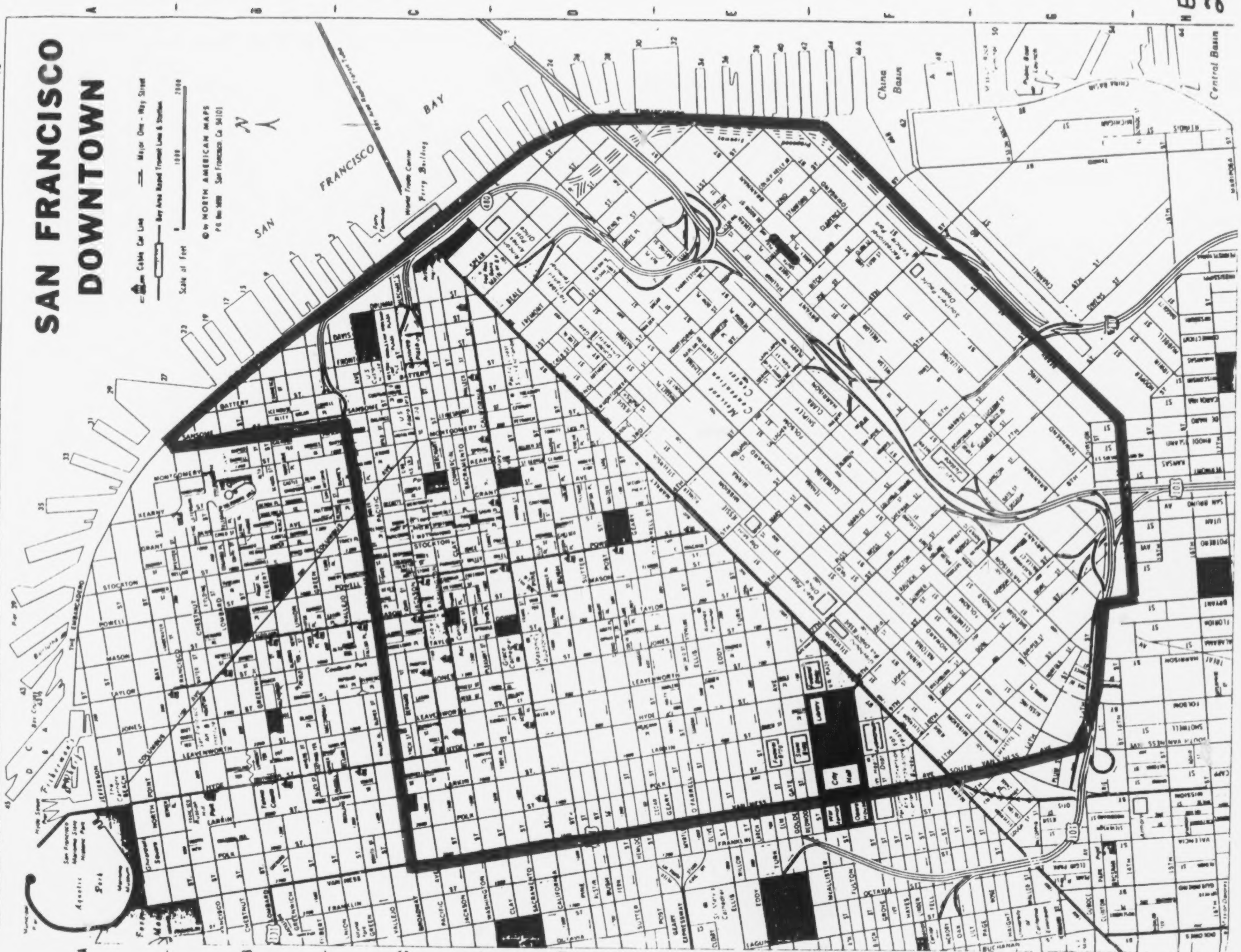
Ex. 23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APPENDIX A

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No. 92-117

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1992

BLUE JEANS EQUITIES WEST
A JOINT VENTURE
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO
A MUNICIPAL CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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Fifth Amendment 2, 3, 4

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A MUNICIPAL CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION

Petitioner BLUE JEANS EQUITIES WEST, A Joint Venture ("BJEW") submits this reply to the Brief In Opposition ("City Brief") filed by Respondent CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("City").

A. *Nollan* Is A Regulatory Takings Case. It Establishes Constitutional Limits Applicable To Exactions In All Forms

Notwithstanding the statement of this Court in *Yee v. Escondido,* 60 U.S.L.W. 4301 (April 1, 1992), most of the City Brief (City Brief 13-21) is devoted to the argument that *Nollan* applies only to "possessory takings" cases.

NOTE: In all quoted material, footnotes are omitted and emphasis is ours unless otherwise stated. We support factual statements by citation to the record before the California Court of Appeal in the manner we followed in our Petition.

Presumably, even City would acknowledge that the Fifth Amendment imposes *some* limitation upon its ability to restrict the exercise of property rights through regulatory fees.[1] Because the Fifth Amendment protects individual rights, questions arising under it begin with an assessment of the burden upon the property owner—the extent to which individuals may be required to accept governmental restrictions on the enjoyment of property interests without payment of just compensation.[2]

A regulatory imposition requiring payment of a fee burdens the right to use property as surely as a requirement that the property owner dedicate an easement over a portion of it. And presumably even City would acknowledge that a fee so large as, for example, to exceed the value of the property would raise serious Fifth Amendment questions, even when it is not coupled with a requirement that the property owner directly give up any possessory or freehold interest in the property as a condition of the right to use it.[3]

If money is property and a payment requirement is a burden that can be as (or more) onerous than a requirement or dedication—*depending upon the facts of each case*[4]—the error in the

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[1] A key section of the *Nollan* opinion (*Nollan v. California Coastal Commission),* 483 U.S. 825 (1987) postulates an example of a fee that would violate constitutional limits. 485 U.S. at 837. The Court's reference to "extortion" and "leveraging of the police power . . . " [*Ibid.*] also imply excessive *monetary* exaction.

[2] See *e.g., Armstrong v. United States,* 364 U.S. 40, 49 (1960).

[3] City cites *United States v. Sperry Corporation,* 493 U.S. 52 (1989) in support of its arguments that payments of fees do not raise Fifth Amendment issues. Among other things, however, this Court decided in *Sperry* that the claimant *did not have a property interest* that had been taken or impaired. 493 U.S. at 59. The Court then sustained the fee in question as reasonable under the circumstances pursuant to federal law applicable to user fees. Because the fee was not required to be paid as a condition to the exercise of a property right, *Sperry* does not apply here.

[4] Takings cases are decided on their particular facts taking into account the particular burden imposed by the regulation under attack. See *e.g., Keystone Bituminous Coal Association v. DeBenedictis,* 480

City's argument and in the decision of the Court of Appeals is clearly exposed. They create a formalistic distinction without substantive foundation. For if City and the Court of Appeal are correct, any public agency with the power of condemnation can levy regulatory fees—and then use the funds thus raised for the express purpose of acquiring easements and other property interests that the condemning authority could not lawfully exact as a permit condition.[5] Because the property owner would be "compensated" for the possessory interest taken, the Fifth Amendment's guarantee would be satisfied as to that aspect of the transaction[6] and would not apply to limit the fee exaction.

Thus *Nollan* becomes dead letter, killed by subtle trickery. No lower court opinion or learned commentary can obscure the fact that City's argument and the decision below lead directly to that result.

U.S. 470, 492-93, 495 (1987); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 224 (1986); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 138 (1978).

[5] California law allows a public agency to assess a property owner for the cost of condemning interests in the owner's property that the owner refuses to dedicate. *Cogan v. City of Los Angeles*, 34 Cal.App.3d 516; 110 Cal.Rptr. 100 (1973). Such action requires only a loose showing of "benefit" to the owner, much less stringent than the *Nollan* nexus requirement. See, *e.g.*, *Harrison v. Board of Supervisors*, 44 Cal.App. 3d 852; 118 Cal.Rptr. 828 (1975). In this way, an owner is compelled to pay for the acquisition of his own land in an involuntary sale.

[6] California law provides broad scope for the exercise of "cleverness and imagination" in the pursuit of such a scheme. Under *City of Porterville v. Young*, 195 Cal.App.3d 1260; 241 Cal.Rptr. 349 (1987) and *City of Fresno v. Cloud*, 26 Cal.App.3d 113; 102 Cal.Rptr. 874 (1972), the "just compensation" required to be paid would not compensate the property owner for the loss of the right to use his property, if the condemning authority first zones the property so as to require the public improvement as a condition upon the right of use.

In *Nollan*, this Court stated:

> We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination... [O]ur cases describe the condition for abridgement of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. [Emphasis in original]. *Nollan*, 483 U.S. at 841.

If substance is to prevail over form, then the *Nollan* test must apply to *all* conditions imposed upon the exercise of such rights, regardless of the form they take or the kind of property they exact.

B. City's Argument That The Legislative Findings In the Transit Impact Development Fee Ordinance Are Conclusive Violates Fundamental Principles Of Constitutional Law

City contends that having established the facial constitutionality of the TIDFO, the constitutionality of the ordinance *as applied* to each affected property owner cannot be challenged. City Brief 21 *et. seq.* The *findings* in the TIDFO are, according to City, conclusive on the key issues of burden and mitigation. *Ibid.*

It is, of course, settled beyond argument that a statute or ordinance may be constitutional on its face and yet unconstitutional as applied to a particular regulated subject. In a facial attack, the plaintiff must demonstrate that there exists *no state of facts* to which the regulation can be constitutionally applied. See, *e.g., Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264 (1981). The inquiry in an "as applied" case addresses the facts of that specific case.[7]

City contends that all "as applied" questions have been foreclosed and rendered non-justiciable by general legislative findings in an enactment that was found constitutional without regard to

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[7] As this Court has often noted, Fifth Amendment cases are decided on their specific facts. See authorities cited at fn. 2.

Nollan[8] and the facts applicable to Levi's Plaza. This remarkable argument defies concepts of judicial review articulated as long ago as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and relied upon ever since.

C. As Applied To Levi's Plaza, The TIDFO Violates The *Nollan* Test

Having successfully urged the court below to disregard *Nollan* as the controlling precedent, City now contends that the TIDF complies with *Nollan* requirements in any case. City Brief 25 *et. seq.* City relies principally upon an environmental impact report that identifies transit impact as a possible project consequence. City Brief 9.

Under California law, an EIR provides information to the decision-makers. It does not embody or record their action.[9] The action in this case was the approval resolution. Ex.2. City conceded its legislative intent on the issue of transit impact when it adopted the approval resolution *by stipulation* (AA 29; ¶ 18) *and by statement of its counsel at trial.*[10]

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[8] *Russ Building Partnership v. City and County of San Francisco,* 44 Cal.3d 839, 845 n.6; 244 Cal.Rptr. 682; 750 P. 2d 324 (1988).

[9] See, *e.g., Laurel Heights Improvement Assn. v. Regents of the University of California*, 47 Cal.3d 376; 253 Cal.Rptr. 426; 764 P.2d 278 (1988); *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 266-67; 235 Cal.Rptr. 788 (1987).

[10] In its discussion of the other projects approved prior to the enactment of the TIDFO, City avoids reference to Wharf Park, a project considered and acted upon after approval of Levi's Plaza and before City approved any other project with a transit impact condition. Wharf Park is a *residential project,* located in the Northeast Waterfront. Ex. 19, AA 227, Strip. AA 29. The language of its approval resolution is identical to Paragraph 5(c) contained in the approval resolution for Levi's Plaza. See ¶ 6, Ex. 19. The language in all of the later projects differed materially from that used in the Wharf Park and Levi's Plaza approval resolution. Compare Ex. 2 and Ex. 19 with Exs. 7-11, 20. The imposition of the same condition on a *residential* project in the next action taken after approval of Levi's demonstrates that City's concern was related to the project's *location* and not its use. The TIDFO effectively redefined

> As of January 4, 1979 [the date when Levi's Plaza was approved] . . . *no [City] employee knew what kind of funding mechanism, if any, would be imposed on BJEW to mitigate the transit impact generated by the Levi's project.* RT 49:18-23.

The record in this case amply demonstrates that the transit problem posed by Levi's Plaza in January of 1979 was the problem of moving people between *the Downtown Area and the Northeast Waterfront.* It was a problem related to geography, not to use. The TIDFO was enacted to mitigate cumulative impacts only of office development in an entirely different and larger area. See Ex. 5.

After approving Levi's Plaza, City subsequently decided that the transit deficit in the Northeast Waterfront was part of a much larger problem, as the tail is part of an elephant. But having identified the tail as the problem related to Levi's Plaza, City cannot now saddle the project with the whole pachyderm.

City's reliance upon the EIR misstates the significance of that document and contradicts key facts that City has admitted.

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the nature of the impact and the mitigation condition two years after the fact.

> . . . A state connot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. *Hughes v. Washington,* 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

CONCLUSION

This case presents an important constitutional issue on a simple record. The decision below is as plainly wrong as it is clearly stated. The result sharply limits an important decision of this Court, exalts form over substance and establishes pernicious precedent.

BJEW's petition should be granted.

Dated: August 28, 1992

Respectfully submitted,

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